

Memorandum 2016-18

Relationship Between Mediation Confidentiality and Attorney Malpractice and Other Misconduct: *In Camera* Screening Process and Related Matters

In this study of the relationship between mediation confidentiality and attorney malpractice and other misconduct, the Commission is in the process of preparing a tentative recommendation that would “propose an exception to the mediation confidentiality statutes (Evid. Code §§ 1115-1128) to address ‘attorney malpractice and other misconduct.’”¹ The Commission has made some key decisions about the proposed new exception, but the staff still needs further guidance before drafting proposed legislation.

Among other things, the Commission tentatively decided that the exception should utilize an *in camera* screening process.² The Commission has not yet fleshed out any details of the *in camera* screening process.

A staff memorandum for the December meeting presented information on approaches used in other jurisdictions and raised numerous questions for the Commission’s consideration.³ Commissioners and other interested persons may want to refer to that memorandum and its supplement (Memorandum 2015-55 and the First Supplement to Memorandum 2015-55) in the course of considering this new memorandum. For the convenience of the Commissioners, we are resending those materials.⁴

At the end of the December memorandum, the staff pointed out that a substantial body of case law establishes that citizens have rights to observe their courts in action and obtain access to judicial records. The staff cautioned that in

1. See Minutes (Aug. 7, 2015), p. 5; Minutes (Oct. 8, 2015, p. 4).

Any California Law Revision Commission document referred to in this memorandum can be obtained from the Commission. Recent materials can be downloaded from the Commission’s website (www.clrc.ca.gov). Other materials can be obtained by contacting the Commission’s staff, through the website or otherwise.

The Commission welcomes written comments at any time during its study process. Any comments received will be a part of the public record and may be considered at a public meeting. However, comments that are received less than five business days prior to a Commission meeting may be presented without staff analysis.

2. See Minutes (Aug. 7, 2015).

3. See Memorandum 2015-55.

4. Other persons can obtain Memorandum 2015-55 and its First Supplement as explained in note 1 *supra*.

developing an *in camera* screening approach and related protections for its proposed new exception, the Commission “will need to understand and take into account the case law on public access to judicial records and proceedings.”⁵ As contemplated in December, this memorandum explores that topic.

The following material is attached as an Exhibit:

Exhibit p.

• California Rules of Court 2.550-2.551 (with Advisory Committee Comments)	1
• California Rules of Court 8.45-8.47 (with Advisory Committee Comments)	8
• CLRC staff, <i>Possible Approaches to Limiting Public Disclosure of Alleged Mediation Communications in a Legal Malpractice Case Based on Mediation Misconduct</i>	20

The memorandum begins by briefly summarizing the drafting decisions that the Commission has already made. Next, the memorandum describes the case law on public access to judicial records and proceedings. Finally, the memorandum discusses the implications of that case law in the context of this study, and presents some options for the Commission to consider in light of that case law.

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5. *Id.* at 41.

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CURRENT CONTOURS OF THE PROPOSED NEW EXCEPTION

In considering the case law on public access to judicial records and proceedings, Commissioners and other interested persons may find it helpful to bear in mind the currently contemplated contours of the exception that the

Commission is drafting. At previous meetings, the Commission made the following decisions for purposes of a tentative recommendation:

- The exception should “only apply to alleged misconduct of an attorney acting as an advocate, not to alleged misconduct of an attorney-mediator.”⁶
- The exception “should only apply to evidence of misconduct that allegedly occurred in the context of a mediation.”⁷
- The exception “should only apply to alleged misconduct in a professional capacity.”⁸
- The exception should apply in a State Bar disciplinary proceeding and in a legal malpractice case. It should not apply in a proceeding relating to enforcement of a mediated settlement agreement.⁹ The Commission has not yet decided how to handle disputes relating to attorney-client fee agreements.¹⁰
- The exception “should apply evenhandedly, permitting use of mediation evidence to prove or disprove a claim.”¹¹ It does not appear necessary to expressly mention “reporting” of professional malfeasance in addition to “proving” and “disproving” such conduct.¹²
- The exception should “apply to all types of mediation evidence,” not just to a private attorney-client discussion or other particular type of mediation communication.¹³
- The exception should include a provision similar to Section 6(d) of the Uniform Mediation Act, which limits the extent of disclosure of mediation communications.¹⁴

6. See Minutes (Oct. 8, 2015), p. 4. For background on this decision, see Memorandum 2015-45, pp. 9-17.

7. See Minutes (Oct. 8, 2015), p. 5. “This would include misconduct that allegedly occurred at any stage of the mediation process (encompassing the full span of mediation activities, such as a mediation consultation, a face-to-face mediation session, a mediation brief, a mediation-related phone call, or other mediation-related activity).” *Id.* (emphasis in original). The determinative factor is “whether the misconduct allegedly occurred in a mediation context, not the time and date of the alleged misconduct.” *Id.* For background on this decision, see Memorandum 2015-45, pp. 17-21.

8. See Minutes (Aug. 7, 2015), p. 5.

9. See Minutes (Oct. 8, 2015), p. 5. For background on this decision, see Memorandum 2015-45, pp. 21-23, 25.

10. See Minutes (Oct. 8, 2015), p. 5. For discussion of this matter, see Memorandum 2015-45, pp. 23-25.

11. See Minutes (Aug. 7, 2015), p. 5. For background on this decision, see Memorandum 2015-45, pp. 25-27.

12. See Minutes (Oct. 8, 2015), pp. 5-6.

13. See Minutes (Oct. 8, 2015), p. 6. For background on this decision, see Memorandum 2015-45, pp. 31-33.

14. See Minutes (Oct. 8, 2015), p. 6. Section 6(d) of the Uniform Mediation Act provides:

(d) If a mediation communication is not privileged under subsection (a) or (b), only the portion of the communication necessary for the application of the exception from nondisclosure may be admitted. Admission of evidence under

- The exception should not specify any sanction to impose upon a party who (1) seeks admission or disclosure of mediation evidence pursuant to the exception, (2) causes others to incur expenses or expend effort in response, and (3) ultimately fails to prevail.¹⁵ Existing law on the availability of sanctions and similar consequences should be sufficient.¹⁶
- The exception should expressly state that it is not intended to affect the extent to which a mediator is, or is not, immune from liability under existing law.¹⁷
- The exception should only apply to evidence from a mediation that commences after the exception becomes operative.¹⁸
- The exception should be placed in the Evidence Code.¹⁹
- The existing provision that makes a mediator incompetent to testify in most civil proceedings (Evidence Code Section 703.5) should remain as is.²⁰ Accordingly, the proposed new exception would not alter the circumstances under which a court must consider a mediator incompetent to testify. As under existing law, however, a mediator would not be incompetent to testify as to a statement or conduct that could “be the subject of investigation by the State Bar”²¹

Of the above decisions, for present purposes it seems most important to bear in mind that the Commission’s proposed new exception would only apply to “evidence of misconduct that allegedly occurred *in the context of a mediation*.”²² The exception would not apply to mediation evidence that is relevant to proving or disproving an allegation that an attorney engaged in misconduct *outside the mediation context*. Thus, for example, the exception would apply to evidence that an attorney gave erroneous tax advice at a mediation session or made an unauthorized settlement offer in a mediation brief, but it would not apply to an attorney’s admission during a mediation that the attorney misappropriated client

subsection (a) or (b) does not render the evidence, or any other mediation communication, discoverable or admissible for any other purpose.

For background on this decision, see Memorandum 2015-45, p. 30.

15. See Minutes (Oct. 8, 2015), pp. 6-7. For background on this decision, see Memorandum 2015-45, pp. 43-44.

16. See Minutes (Oct. 8, 2015), pp. 6-7. For background on this decision, see Memorandum 2015-45, pp. 43-44.

17. See, e.g., Code Civ. Proc. §§ 128.5, 128.7.

18. See Minutes (Oct. 8, 2015), p. 7. For background on this decision, see Memorandum 2015-45, p. 44.

19. See Minutes (Aug. 7, 2015), p. 6. For background on this decision, see Memorandum 2015-45, pp. 30-31.

20. See Minutes (Oct. 8, 2015), p. 6. For background on this decision, see Memorandum 2015-45, pp. 41-43.

21. Evid. Code § 703.5.

22. Minutes (Oct. 8, 2015), p. 5 (emphasis added).

funds early in the litigation process, before the possibility of mediating was even discussed.

The Commission chose that approach in October because alleged misconduct *in the mediation context* presents the strongest case for creating a misconduct exception. In that situation, the existing mediation confidentiality statute “might not just hinder proof of misconduct; it might preclude such proof altogether.”²³

As the staff previously explained, that situation also entails special considerations:

When alleged misconduct is in the mediation context, ... *much, if not all, of the evidence bearing on the misconduct claim is likely to consist of mediation communications and mediation documents.* Thus, it is not just a matter of holding an *in camera* hearing with regard to the admissibility of a single piece of evidence. Rather, there will be *numerous* decisions to make regarding admissibility, discoverability, and disclosure of mediation communications and mediation documents, starting at the pleading stage and continuing through discovery and into trial.

For that reason, it might be necessary to use other judicial tools, not just *in camera* proceedings, to achieve the Commission’s desired balance between the policy interest in maintaining confidentiality and the competing interest in holding attorneys accountable for professional misconduct.²⁴

In other words, in adjudicating an allegation of mediation misconduct, a court almost certainly will confront a *panoply* of issues relating to use of mediation evidence.

Consequently, if the court is to provide any measure of protection for the interest in mediation confidentiality, it may be necessary to combine an *in camera* screening process with other judicial techniques, such as sealing orders, protective orders, and redaction of documents.²⁵ Such techniques “are essentially compromise measures, means of providing some access to sensitive information for purposes of achieving justice in a pending suit, without affording full public disclosure.”²⁶ As discussed below, however, an important set of constraints, grounded in the federal Constitution, common law, and other sources, may come into play when a statute directs or permits a court to use techniques that would restrict public access to the adjudication process.

23. Memorandum 2015-45, p. 20.

24. *Id.* at 6-7 (emphasis in original).

25. For further discussion of this point, see *id.* at 31-33.

26. *Id.* at 8.

PUBLIC ACCESS TO JUDICIAL RECORDS AND PROCEEDINGS

“People in an open society do not demand infallibility from their institutions, but it is difficult for them to accept what they are prohibited from observing.”²⁷ For that and other reasons, several sources protect public access to the judicial process in California:

- (1) The First Amendment to the United States Constitution, which applies to the states through the Fourteenth Amendment to the United States Constitution.²⁸
- (2) Similar provisions in the California Constitution (Cal. Const. art. I, §§ 2(a), 3(b)).
- (3) Code of Civil Procedure Section 124.²⁹
- (4) California Rules of Court 2.550 and 2.551 (applicable to trial courts).
- (5) California Rules of Court 8.45 to 8.47 (applicable to reviewing courts).
- (6) Common law.

Because the federal Constitution is “the supreme law of the land,”³⁰ we begin by describing the First Amendment right of access. In the process, we also describe Code of Civil Procedure Section 124. After the First Amendment discussion, we more briefly describe the other legal bases protecting access.

THE FIRST AMENDMENT RIGHT OF ACCESS

“[T]he First Amendment embodies more than a commitment to free expression and communicative interchange for their own sakes; it has a *structural* role to play in securing and fostering our republican system of self-government.”³¹ “[T]here is practically universal agreement that a major purpose of that Amendment was to protect the free discussion of governmental affairs.”³²

27. *Richmond Newspapers v. Virginia*, 448 U.S. 555, 572 (1980).

28. A criminal defendant is also entitled to a “public trial” under the Sixth Amendment of the United States Constitution. The Sixth Amendment right to a public trial is beyond the scope of this memorandum. According to the California Supreme Court, “the governing principles under that amendment are the same as those pertaining to the right of access under the First Amendment.” *NBC Subsidiary (KNBC-TV), Inc. v. Superior Court*, 20 Cal. 4th 1178, 1213 n. 31, 980 P.2d 330, 86 Cal. Rptr. 2d 778 (1999).

29. “The California Public Records Act (Gov. Code § 6250 et seq; CPRA), governs requests for the records of most public agencies, but it does not apply to the judicial branch.” *Sander v. State Bar of California*, 58 Cal. 4th 300, 314 P.3d 488, 165 Cal. Rptr. 3d 250 (2013).

30. U.S. Const. art. VI, § 2.

31. *Richmond Newspapers*, 448 U.S. at 587 (Brennan, J., concurring) (emphasis in original).

32. *Mills v. Alabama*, 384 U.S. 214, 218 (1966).

Implicit in the structural role of the First Amendment, however, “is not only ‘the principle that debate on public issues should be uninhibited, robust, and wide-open,’ but also the antecedent assumption that valuable public debate — as well as other civic behavior — *must be informed*.”³³ “A popular Government, without popular information, or the means of acquiring it, is but a Prologue to a Farce or a Tragedy; or, perhaps both.”³⁴

To be informed about how courts are interpreting and applying the laws governing them, citizens must have some degree of access to judicial proceedings.³⁵ In a series of cases decided in the 1980’s, the United States Supreme Court explored the extent to which the public has a First Amendment right of access to various criminal proceedings.³⁶ We start by describing those ground-breaking decisions.

Leading Decisions on First Amendment Access to Criminal Proceedings

The United States Supreme Court has developed (1) a 2-prong test for determining whether the public has a First Amendment right of access to a criminal proceeding and (2) a multi-part test for determining whether a limitation on such a right of access is valid. We describe the development and nature of those tests below.

Justice Brennan’s Concurrence in Richmond Newspapers: The 2-Prong Test for Determining Whether a Presumptive First Amendment Right of Access Exists

The first case in which the United States Supreme Court squarely recognized a First Amendment right of access to a criminal proceeding was *Richmond Newspapers v. Virginia*.³⁷ In that case, a newspaper and some of its reporters challenged a court order excluding the press and public from a murder trial. Their challenge eventually reached the United States Supreme Court, which

33. *Richmond Newspapers*, 448 U.S. at 587 (Brennan, J., concurring) (emphasis added), *quoting* *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964).

34. *EPA v. Mink*, 410 U.S. 73, 110-11 (1973) (Douglas, J., dissenting), *quoting* Letter to W.T. Barry, Aug. 4, 1822, 9 *The Writings of James Madison* 103 (Hunt ed. 1910).

35. See, e.g., *United States v. Erie County*, 763 F.3d 235, 239 (2d Cir. 2014) (“To ensure that ours is indeed a government of the people, by the people, and for the people, it is essential that the people themselves have the ability to learn of, monitor, and respond to the actions of their representatives and their representative institutions.”).

36. In an earlier case, the United States Supreme Court assumed, without deciding, that the public had a First Amendment right of access to a pretrial hearing on a criminal defendant’s motion to suppress certain evidence. See *Gannett Co. v. DePasquale*, 443 U.S. 368 (1970). The Court concluded that under the circumstances of that case, that First Amendment right (if it existed) was not violated. In subsequent cases, the Court has essentially overruled its decision on this point in *Gannett*. See *NBC Subsidiary*, 20 Cal. 4th at 1205 n. 22.

37. 448 U.S. 555 (1980).

decided that the complete closure of the trial violated the First Amendment. There was no majority opinion, but the analysis in Justice Brennan's concurrence later became the "actual touchstone" for the new doctrine of access to court proceedings.³⁸

In determining whether there was a First Amendment right of access to a criminal trial, Justice Brennan pointed to "two helpful principles."³⁹ In particular,

- (1) "[T]he case for a right of access has special force when drawn from an enduring and vital *tradition* of public entree to particular proceedings or information. Such a tradition commands respect in part because the Constitution carries the gloss of history. More importantly, a tradition of accessibility implies the favorable judgment of experience."⁴⁰
- (2) "[T]he value of access must be measured in specifics. Analysis is not advanced by rhetorical statements that all information bears upon public issues; what is crucial in individual cases is whether access to a particular government process is *important in terms of that very process*."⁴¹

In other words, to determine whether there was a First Amendment right of access to a criminal trial, it was necessary to "consult historical and current practice with respect to open trials, and weigh the importance of public access to the trial process itself."⁴²

With respect to the first principle, Justice Brennan readily found that our nation has an "ingrained tradition of public trials."⁴³ With respect to the second principle, Justice Brennan explained that public access "serves to advance several of the particular purposes of the trial (and, indeed, the judicial) process."⁴⁴ In particular,

- "Open trials play a fundamental role in furthering the efforts of our judicial system to *assure ... a fair and accurate adjudication of guilt or innocence*."⁴⁵

38. See *NBC Subsidiary*, 20 Cal. 4th at 1200.

39. *Richmond Newspapers*, 448 U.S. at 589 (Brennan, J., concurring).

40. *Id.* (citation omitted; emphasis added).

41. *Id.* (emphasis added).

42. *Id.*

43. *Id.* at 598; see also *id.* at 593 ("As a matter of law and virtually immemorial custom, public trials have been the essentially unwavering rule in ancestral England and in our own Nation.").

44. *Id.* at 593.

45. *Id.* (emphasis added); see also *Press Enterprise Co. v. Superior Court*, 478 U.S. 1, 7 (1986) ("The right to an open public trial is a shared right of the accused and the public, the common concern being the assurance of fairness.").

- It is not enough to achieve justice; *there must also be an appearance of justice*.⁴⁶ “Open trials assure the public that procedural rights are respected, and that justice is afforded equally.”⁴⁷ In contrast, closed trials “breed suspicion of prejudice and arbitrariness, which in turn spawns disrespect for law.”⁴⁸ Thus, “public access is essential, ... if trial adjudication is to achieve the objective of *maintaining public confidence in the administration of justice*.”⁴⁹
- “[C]ourt rulings impose official and practical consequences upon members of society at large. Moreover, judges bear responsibility for the vitally important task of construing and securing constitutional rights.”⁵⁰ “It follows that *the conduct of the trial is pre-eminently a matter of public interest*.”⁵¹
- “[P]ublic access to trials acts as *an important check*, akin in purpose to the other checks and balances that infuse our system of government.”⁵² “The knowledge that every criminal trial is subject to contemporaneous review in the forum of public opinion is an effective restraint on possible abuse of judicial power.”⁵³
- “Publicizing trial proceedings aids accurate factfinding,” which “is of concern to the public as well as to the parties.”⁵⁴

For these reasons, Justice Brennan concluded that “public access is an indispensable element of the trial process itself,” and “assumes structural importance in our ‘government of laws.’”⁵⁵

46. See *Richmond Newspapers*, 448 U.S. at 594 (Brennan, J., concurring). See also *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501, 508 (1984) (“*Press-Enterprise I*”), in which the Court explained:

The value of openness lies in the fact that people not actually attending trials can have confidence that standards of fairness are being observed; the sure knowledge that *anyone* is free to attend gives assurance that established procedures are being followed and that deviations will become known. Openness thus enhances both the basic fairness of the criminal trial and the appearance of fairness so essential to public confidence in the system.

(Emphasis in original.)

47. *Richmond Newspapers*, 448 U.S. at 595 (Brennan, J., concurring).

48. *Id.*

49. *Id.* (emphasis added).

50. *Id.*

51. *Id.* at 596 (emphasis added).

52. *Id.* (emphasis added).

53. *Id.*, quoting *In re Oliver*, 333 U.S. 257, 270 (1948).

54. *Id.* at 597. As the Court later explained in *Press-Enterprise I*,

When the public is aware that the law is being enforced and the criminal justice system is functioning, an outlet is provided for [the community’s urge to retaliate against violent crimes]. Proceedings held in secret would deny this outlet and frustrate the broad public interest; by contrast, public proceedings vindicate the concerns of the victims and the community in knowing that offenders are being brought to account for their criminal conduct by jurors fairly and openly selected.

464 U.S. at 509; see also *Press-Enterprise Co. v. Superior Court*, 478 U.S. 1, 13 (1986) (“*Press-Enterprise II*”) (referring to “‘community therapeutic value’ of openness” — i.e., idea that public trial provides an outlet for “public concern, outrage, and hostility” prompted by violent crime).

Notably, Justice Brennan did *not* say that the public has an *absolute* right of public access to a criminal trial. To the contrary, he wrote that “any privilege of access to governmental information is subject to a degree of restraint dictated by the nature of the information and countervailing interests in security or confidentiality.”⁵⁶ In the case before him, Justice Brennan did not need to explore “[w]hat countervailing interests might be sufficiently compelling to reverse th[e] presumption of openness,” because the statute in question “authorize[d] trial closures at the unfettered discretion of the judge and parties.”⁵⁷

Globe, Press-Enterprise I, and Press-Enterprise II: The Multi-Part Test for Determining Whether a Limitation on a First Amendment Right of Access is Valid

In a string of cases decided shortly after *Richmond Newspapers*, the Court endorsed Justice Brennan’s 2-prong test for determining whether there is a First Amendment right of access to a criminal proceeding,⁵⁸ as well as his conclusion that any such right is not absolute.⁵⁹ The Court also explored the circumstances under which a countervailing interest can overcome a First Amendment right of access.

For example, *Globe Newspaper Co. v. Superior Court*⁶⁰ involved a state statute that *mandated* courtroom closure during the testimony of minor victims in criminal trials. Applying the 2-prong test focusing on historical tradition and structural functionality of public access, the Court reaffirmed that “the press and general public have a constitutional right of access to criminal trials.”⁶¹ The Court further explained that where “the State attempts to deny the right of access in order to inhibit the disclosure of sensitive information, *it must be shown that the denial is necessitated by a compelling governmental interest, and is narrowly tailored to serve that interest.*”⁶²

Applying that standard, the Court said that safeguarding the physical and psychological well-being of a minor was a compelling interest.⁶³ That compelling

55. *Richmond Newspapers*, 448 U.S. at 597 (Brennan, J., concurring), *quoting* *Marbury v. Madison*, 1 Cranch 137, 163 (1803).

56. *Id.* at 586.

57. *Id.* at 598.

58. See *Butterworth v. Smith*, 494 U.S. 624, 629-30 (1990); *Press-Enterprise II*, 478 U.S. at 8-9; *Press-Enterprise I*, 464 U.S. at 505-10; *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 605-06 (1982).

59. See, e.g., *Butterworth*, 494 U.S. at 630; *Press-Enterprise II*, 478 U.S. at 10; *Press Enterprise I*, 464 U.S. at 510; *Globe*, 457 U.S. at 606.

60. 457 U.S. 596 (1982).

61. *Id.* at 603.

62. *Id.* at 606-07 (emphasis added).

63. *Id.* at 607.

interest was not sufficient to justify a *mandatory* courtroom closure rule, however, because the circumstances of a particular case could “affect the significance of the interest.”⁶⁴ In the Court’s view, the policy interest “could be served just as well by requiring the trial court to determine on a case-by-case basis whether the State’s legitimate concern for the well-being of the minor victim necessitates closure. That alternative approach would “ensur[e] that the constitutional right of the press and public to gain access to criminal trials [would] not be restricted except where *necessary* to protect the State’s interest.”⁶⁵ The Court thus decided that the *mandatory* courtroom closure rule was not “a narrowly tailored means of accommodating the State’s asserted interest.”⁶⁶

Similarly, *Press-Enterprise I* involved a blanket closure of six weeks of jury selection in a criminal case. As in *Richmond Newspapers* and *Globe*, the Court said there was a First Amendment right of access to the criminal proceeding in question, creating a “presumption of openness.”⁶⁷ The Court further explained:

The presumption of openness may be overcome only by an *overriding interest* based on findings that closure is *essential to preserve higher values* and is *narrowly tailored* to serve that interest. The interest is to be articulated along with *findings specific enough* that a reviewing court can determine whether the closure order was properly entered.⁶⁸

The Court appeared to view that standard as equivalent to *Globe*’s requirements that a denial of public access be “necessitated by a compelling governmental interest” and “narrowly tailored to serve that interest.”⁶⁹

With regard to jury selection, the Court recognized that the process “*may, in some circumstances, give rise to a compelling interest* of a prospective juror when interrogation touches on deeply personal matters that person has legitimate reasons for keeping out of the public domain.”⁷⁰ The Court said a trial judge should follow an *in camera* approach to achieve an appropriate balance of juror privacy and public access in such situations:

To preserve fairness and at the same time protect legitimate privacy, a trial judge must at all times maintain control of the process of jury selection and should inform the array of prospective

64. *Id.* at 608.

65. *Id.* at 609 (emphasis added).

66. *Id.*

67. 446 U.S. at 510.

68. See *id.* (emphasis added).

69. *Id.* at 510.

70. *Id.* at 511 (emphasis added).

jurors, once the general nature of sensitive questions is made known to them, that those individuals believing public questioning will prove damaging because of embarrassment, may properly request an opportunity to present the problem to the judge *in camera* but with counsel present and on the record.

By requiring the prospective juror to make an affirmative request, the trial judge can ensure that there is in fact a valid basis for a belief that disclosure infringes a significant interest in privacy. *This process will minimize the risk of unnecessary closure.* The exercise of sound discretion by the court may lead to excusing such a person from jury service. When limited closure is ordered, the constitutional values sought to be protected by holding open proceedings may be satisfied later by making a transcript of the closed proceedings available within a reasonable time, if the judge determines that disclosure can be accomplished while safeguarding the juror's privacy interests. Even then a valid privacy right may rise to a level that part of the transcript should be sealed, or the name of a juror withheld, to protect the person from embarrassment.⁷¹

The Court concluded that the First Amendment was violated because the trial judge had not followed such an approach, had not articulated specific findings to support his closure order, and had not considered alternatives to closure.⁷²

The Court's analysis in *Press-Enterprise II*, decided two years later, was similar. The Court applied the same standards as in *Press-Enterprise I*, concluded that "a qualified First Amendment right of access attaches to preliminary hearings in California,"⁷³ and determined that the right of access was violated.⁷⁴ Among other things, the Court pointed out that any limitation on access must be "narrowly tailored" but there had been no attempt to "consider whether alternatives short of complete closure would have protected the interests of the accused."⁷⁵

Leading Decisions on First Amendment Access to a Civil Proceeding

Although the United States Supreme Court has repeatedly addressed First Amendment access to criminal proceedings, it has given less guidance about First Amendment access in the context of a civil case. In the next section, we discuss a few relevant decisions from that tribunal. Next, we describe a decision

71. *Id.* at 512 (emphasis added).

72. *Id.* at 513.

73. 478 U.S. at 13.

74. *Id.* at 14.

75. *Id.* at 14, 15.

of the California Supreme Court, which has addressed civil cases in greater detail.

Limited Guidance From the United States Supreme Court

In dictum in *Gannett v. DePasquale*, a case focusing on a criminal defendant's Sixth Amendment right to a "public trial" (not on the First Amendment right of access) and predating the string of criminal cases discussed above, the United States Supreme Court noted that it would be difficult to differentiate between access to a criminal case and access to a civil case:

[M]any of the advantages of public criminal trials are equally applicable in the civil trial context. While the operation of the judicial process in civil cases is often of interest only to the parties in the litigation, this is not always the case. [E.g., *Dred Scott v. Sandford*; *Plessy v. Ferguson*; *Brown v. Board of Education*; *University of California Regents v. Bakke*.] Thus, in some civil cases the public interest in access, and the salutary effect of publicity, may be as strong as, or stronger than, in most criminal cases.⁷⁶

In *Seattle Times Co. v. Rhinehart*,⁷⁷ however, the Court made clear that a civil litigant "has no First Amendment right of access to information made available only for purposes of trying his suit,"⁷⁸ and thus where "a protective order is entered on a showing of good cause ..., is limited to the context of pretrial civil discovery, and does not restrict the dissemination of the information if gained from other sources, it does not offend the First Amendment."⁷⁹ The Court explained that discovery processes are a matter of "legislative grace," so "court control over the discovered information does not raise the same specter of government censorship that such control might suggest in other situations."⁸⁰ The Court also offered the following justifications for denying First Amendment access to the discovery process:

- "[P]retrial depositions and interrogatories are not public components of a civil trial."⁸¹ Consequently, "restraints placed on discovered, but not yet admitted, information are not a restriction on a traditionally public source of information."⁸²

76. 443 U.S. at 386 n.15.

77. 467 U.S. 20 (1982).

78. *Id.* at 32.

79. *Id.* at 37.

80. *Id.* at 32.

81. *Id.* at 33.

82. *Id.*

- Under the discovery rules, “[t]here is an opportunity ... for litigants to obtain — incidentally or purposefully — information that not only is irrelevant but if publicly released could be damaging to reputation and privacy.”⁸³ Preventing “abuse that can attend the coerced production of information under a State’s discovery rule is sufficient justification for the authorization of protective orders.”⁸⁴
- “The unique character of the discovery process requires that the trial court have substantial latitude to fashion protective orders.”⁸⁵ “[H]eighted First Amendment scrutiny of each request for a protective order would necessitate burdensome evidentiary findings and could lead to time-consuming interlocutory appeals”⁸⁶

The Court has not addressed other aspects of a civil case, only the discovery context.

Guidance From the California Supreme Court in NBC Subsidiary: An Ordinary Civil Proceeding is “Presumptively Open”

Unlike the United States Supreme Court, the California Supreme Court has ruled on First Amendment access to an ordinary civil proceeding. In *NBC Subsidiary (KNBC-TV) v. Superior Court*, it held that “substantive courtroom proceedings in ordinary civil cases are ‘presumptively open’”⁸⁷ and courts must construe “California’s long-standing ‘open court’ statute”⁸⁸ (Code of Civil Procedure Section 124)⁸⁹ consistently with the same constitutional requirements that apply to criminal cases.⁹⁰ More specifically, the California Supreme Court held that whenever a substantive courtroom proceeding is presumptively open because it satisfies the United States Supreme Court’s 2-prong test examining the history and utility of public access, Section 124 precludes closure of the proceeding unless the following things occur:

- The trial court “must provide notice to the public of the contemplated closure.”⁹¹

83. *Id.* at 35.

84. *Id.* at 35-36.

85. *Id.* at 36.

86. *Id.* at 36 n.23.

87. 20 Cal. 4th at 1217.

88. *Id.* at 1181.

89. Code of Civil Procedure Section 124 provides: “Except as provided in Section 214 of the Family Code or any other provision of law, the sittings of every court shall be public.”

90. *NBC Subsidiary*, 20 Cal. 4th at 1181.

91. *Id.* at 1217.

- [B]efore substantive courtroom proceedings are closed or transcripts ordered sealed, a trial court must hold a hearing and expressly find that (i) there exists an overriding interest supporting closure and/or sealing; (ii) there is a substantial probability that the interest will be prejudiced absent closure and/or sealing; (iii) the proposed closure and/or sealing is narrowly tailored to serve the overriding interest; and (iv) there is no less restrictive means of achieving the overriding interest.”⁹²

The California Supreme Court gave a number of different reasons for holding that the First Amendment right of access applies to civil, as well as criminal, proceedings:

- “Although the high court’s opinions in *Richmond Newspapers*, *Globe*, *Press-Enterprise I*, and *Press-Enterprise II* all arose in the criminal context, the reasoning of these decisions suggests that the First Amendment right of access extends beyond the context of criminal proceedings and encompasses civil proceedings as well.”⁹³
- “[E]very lower court opinion of which we are aware that has addressed the issue of First Amendment access to *civil* trials and proceedings has reached the conclusion that the constitutional right of access applies to civil as well as to criminal trials.”
- The United States Supreme Court “has suggested in dicta that a ... right of access exists in civil cases”⁹⁴
- The United States Supreme Court “has not accepted review of any of the numerous lower court cases that have found a general First Amendment right of access to civil proceedings”⁹⁵
- “We believe that the public has an interest, in *all* civil cases, in observing and assessing the performance of its public judicial system, and that interest strongly supports a general right of access in ordinary civil cases.”⁹⁶
- “[A] trial court is a public governmental institution. Litigants certainly anticipate, upon submitting their disputes for resolution in a public court, before a state-appointed or publicly elected judge, that the proceedings in their case will be adjudicated in public.”⁹⁷

92. *Id.* at 1217-18 (footnotes omitted, emphasis in original).

93. *Id.* at 1207.

94. *Id.* at 1209.

95. *Id.*

96. *Id.* at 1210 (emphasis in original); see also *Publicker Industries, Inc. v. Cohen*, 733 F.2d 1059, 1070 (3d Cir. 1984) (“Public access to civil trials, no less than criminal trials, plays an important role in the participation and the free discussion of governmental affairs.”).

97. *NBC Subsidiary*, 20 Cal. 4th at 1211.

- “[T]he utilitarian values supporting public criminal trials and proceedings apply with at least equal force in the context of ordinary civil trials and proceedings.”⁹⁸ “Public access plays an important and specific structural role in the conduct of such proceedings. Public access to civil proceedings serves to (i) demonstrate that justice is meted out fairly, thereby promoting public confidence in such governmental proceedings; (ii) provide a means by which citizens scrutinize and check the use and possible abuse of judicial power; and (iii) enhance the truthfinding function of the proceeding.”⁹⁹
- “[T]he availability of a trial transcript is no substitute for a public presence at the trial itself. As any experienced appellate judge can attest, the ‘cold’ record is a very imperfect reproduction of events that transpire in the courtroom.”¹⁰⁰

Having found a First Amendment right of access to ordinary civil proceedings, the California Supreme Court went on to rule that the trial court erred in excluding the press and public from all *in camera* proceedings in the case at hand, which involved prominent figures in the entertainment industry.¹⁰¹ The Court was sympathetic to the trial court’s desire to prevent jurors from hearing inadmissible evidence, which could jeopardize the litigants’ rights to a fair trial.¹⁰² But it faulted the trial court on several grounds:

- The trial court “made no finding supporting the proposition that prejudice to [the interest in a fair trial] was *substantially probable* absent closure and temporary sealing.”¹⁰³
- The trial court’s “blanket and sweeping order closing the courtroom during *all* nonjury proceedings was not narrowly tailored; the trial court wholly failed to identify particular proceedings that would or did contain information justifying closure.”¹⁰⁴
- “[T]here were less restrictive means, short of closure, of achieving the overriding interest in a fair trial.”¹⁰⁵ In particular, the trial court could have used cautionary jury instructions and admonitions to achieve the same end.¹⁰⁶

98. *Id.*

99. *Id.* at 1219.

100. *Id.* at 1220.

101. *Id.* at 1222-23; see also *id.* at 1182.

102. See *id.* at 1182, 1222.

103. See *id.* at 1222 (emphasis in original).

104. *Id.* at 1223.

105. *Id.*

106. *Id.* at 1223-24.

The California Supreme Court rejected a claim that its alternative approach would be overly burdensome:

The need to comply with the requirements of the First Amendment right of access may impose some burdens on trial courts. But courts can and should minimize such inconveniences by proposing to close proceedings only in the rarest of circumstances Accordingly, the burden imposed by requiring trial courts to give notice of a closure hearing and make the constitutionally required findings, and the ensuing burden imposed by permitting review of closure orders by extraordinary writ, will not unduly encumber our trial or appellate courts.¹⁰⁷

In a footnote, the California Supreme Court also seemed to qualify its comment that “*before* substantive courtroom proceedings are closed or transcripts ordered sealed, a trial court must hold a hearing and expressly find” that the constitutional requirements are met.¹⁰⁸ It explained:

The high court cases, and their lower court progeny, suggest a flexible and context-specific approach to the timing of the closure hearing and requisite trial court findings. At one end of the spectrum, a *preclosure hearing* with requisite findings is required before closure may occur. For example, in *Press-Enterprise II* ..., the high court held that a preliminary hearing “shall be closed only if specific findings are made demonstrating that first, there is a substantial probability that the defendant’s right to a fair trial will be prejudiced by publicity that closure would prevent” The high court apparently contemplates a *preclosure hearing* in these circumstances and would, we assume, require a *preclosure hearing* and findings in a situation ... in which the trial court apparently planned, well in advance, to conduct in closed session essentially all substantive proceedings held outside the jury’s presence.

At the other end of the spectrum, as a general matter a closure hearing of course is not required prior to or even after the holding of most bench conferences. Even with regard to bench or chambers proceedings at which substantive rulings are made, courts have approved after-the-fact closure hearings and findings. For example, the high court in *Press-Enterprise I* ... did not suggest that a trial court must articulate findings that a closed chambers voir dire hearing is necessary *before* such a hearing takes place, but instead contemplated that a trial court should make after-the-fact findings concerning whether the transcripts of such a closed hearing should remain sealed or should be disclosed in full or in part. Consistently, *Valenti* ... contains broad language suggesting that the trial court did not err in closing pretrial bench and chambers proceedings

107. *Id.* at 1178.

108. *NBC Subsidiary*, 20 Cal. 4th at 1217-18 (emphasis in original).

without first conducting a closure hearing, and that an after-the-fact hearing with appropriate findings was sufficient.¹⁰⁹

The Court's point seems to be that a trial court should conduct a pre-closure hearing (upon ample notice) and make pre-closure findings where that is reasonably possible, but an after-the-fact closure hearing and findings are sufficient when the practicalities of the situation warrant as much.

The California Supreme Court further "observed[d] that various statutes set out, for example, in the Code of Civil Procedure, Family Code, and Welfare and Institutions Code provide for closure of certain civil proceedings."¹¹⁰ The Court carefully noted that it was addressing "the right of access to ordinary civil proceedings in general, and not any right of access to particular proceedings governed by specific statutes."¹¹¹

Further Development of the First Amendment Case Law

There is an extensive body of case law from lower courts, both within the federal system and in California and other states, discussing whether and how the First Amendment right of access applies in various different contexts. The staff has done much research in the area, although it would be prohibitively time-consuming to look at all the relevant cases.

For present purposes, it is not necessary to burden the Commission with every detail of this area of the law. The leading decisions described above should suffice to give the Commission some basic insight into the general approach and lines of reasoning the courts are using. However, a number of other matters warrant discussion, as explained below.

First Amendment Access to Judicial Records

"While most federal circuit courts of appeals have ... recognized a First Amendment right of access to court documents, the United States Supreme Court has not yet done so."¹¹² Despite the lack of guidance from the United States Supreme Court, the law on access to judicial records appears fairly clear and consistent.

In accordance with the United States Supreme Court's decision in *Seattle Times*, "decisions have held that the First Amendment *does not* compel public

109. *Id.* at 1217 n.37 (emphasis in original).

110. *Id.* at 1212 n.30 (emphasis in original).

111. *Id.*

112. *Overstock.com, Inc. v. Goldman Sachs Group, Inc.*, 231 Cal. App. 4th 471, 485 n.5, 180 Cal. Rptr. 3d 234 (2014).

access to discovery materials that are *neither used at trial nor submitted as a basis for adjudication.*"¹¹³ Likewise, there is no First Amendment right of access to materials filed in connection with a routine discovery motion.¹¹⁴ Such treatment reflects that

modern discovery is a preliminary evidence-finding process in which policy favors the broadest possible disclosure so that all admissible evidence may be found and set aside for eventual use in the truth-finding process of trial. The discovery process, which is intended to be largely self-enforcing, would be greatly impeded if every document a party might produce was ipso facto open to public inspection. Records now freely disclosed under protective orders, often entered by stipulation, would require laborious collateral litigation to establish grounds for a sealing order. This would impose a substantial new burden on parties as well as on the courts, all in derogation of a process that is largely a modern invention and has never been conceived as open to the public. Moreover, since discovered materials are not court records until filed in court in connection with a motion or trial, it is unclear how a right of public access would be effectuated. It is therefore eminently sound to exempt discovered material from the presumptive right of public access Such access is favored neither by tradition nor by functional analysis.¹¹⁵

In contrast, the California Supreme Court and "[n]umerous reviewing courts ... have found a First Amendment right of access to civil litigation documents *filed in court as a basis for adjudication.*"¹¹⁶ As the Second District Court of Appeal explained, "[n]o meaningful distinction may be drawn between the right of access to courtroom proceedings and the right of access to court records that are *the foundation of and form the adjudicatory basis for those proceedings.*"¹¹⁷ "An adjudication is a formal act of government, the basis of which should, absent exceptional circumstances, be subject to public scrutiny."¹¹⁸

113. *NBC Subsidiary*, 20 Cal. 4th at 1208 n.25 (emphasis added).

114. *H.B. Fuller Co. v. Doe*, 151 Cal. App. 4th 879, 893, 60 Cal. Rptr. 3d 501 (2007).

115. *Id.*; see also *Joy v. North*, 692 F.2d 880, 893 (2d Cir. 1982) ("Discovery involves the use of compulsory process to facilitate orderly preparation for trial, not to educate or titillate the public. Private matters which are discoverable may, upon a showing of cause, be put under seal").

116. *NBC Subsidiary*, 20 Cal. 4th at 1208 n.25 (emphasis added). The First Amendment and the counterpart state free speech provision apply to records of adjudicatory proceedings. They are not implicated with regard to other records. *Sander*, 58 Cal. 4th at 319 n.7.

117. *In re Marriage of Burkle*, 135 Cal. App. 4th 1045, 1052, 37 Cal. Rptr. 3d 805 (2006) (emphasis added); see also *id.* at 1061-62.

118. *Joy*, 692 F.2d at 893; see also *United States v. Amodeo*, 71 F.3d 1044, 1049 (2d Cir. 1995) (explaining, in connection with common law right of access, that public has "especially strong" right of access to evidence that is or will be used at trial); *Company Doe v. Public Citizen*, 749 F.3d 246, 268 (4th Cir. 2014) (holding that "First Amendment right of access extends not only to

Thus, discovery materials generally become subject to a First Amendment right of access when they are used at trial or in connection with a summary judgment motion or other substantive motion.¹¹⁹ This appears to be true “regardless of the ground on which the trial court ultimately rules.”¹²⁰

According to a recent California case, however, that general principle is subject to an important caveat. “[I]rrelevant discovery materials or materials as to which evidentiary objections are sustained, are not ‘submitted as a basis for adjudication’ and thus are not within the ambit of the constitutional right of access”¹²¹

A further complication is that “not all discovery motions involve routine matters or essentially procedural questions.”¹²² Rather, “questions of great significance to members of the public” lie at the heart of some discovery motions.¹²³ At least one California appellate court has said that a First Amendment right of access might attach in such circumstances.¹²⁴

The underlying principle is that a litigant essentially forfeits a measure of privacy when the litigant invokes the court’s adjudicatory powers. When individuals “‘employ the public powers of state courts to accomplish private ends, ... they do so in full knowledge of the possibly disadvantageous circumstance that the documents and records filed ... will be open to public inspection.’”¹²⁵ In a sense, such civil litigants “‘take the good with the bad, knowing that *with public protection comes public knowledge*’ of otherwise private

the parties’ summary judgment motions and accompanying materials but also to a judicial decision adjudicating a summary judgment motion.”).

119. See, e.g., *Overstock.com*, 231 Cal. App. 4th at 492; *Mercury Interactive Corp. v. Klein*, 158 Cal. App. 4th 60, 85, 70 Cal. Rptr. 3d 88 (2007); *Savaglio v. Wal-Mart Stores, Inc.*, 149 Cal. App. 4th 588, 597 n.6, 57 Cal. Rptr. 3d 215 (2007).

In cases construing the federal common law right of access, the Ninth Circuit has similarly distinguished between materials attached to a “dispositive” motion and materials attached to a “non-dispositive” motion. See, e.g., *Midland Nat’l Life Ins. Co. Annuity Sales Practices Litigation v. Allianz Life Ins. Co.*, 686 F.3d 1115 (9th Cir. 2012); *Pintos v. Pacific Creditors Ass’n*, 605 F.3d 665 (9th Cir. 2010); *Kamakana v. City & County of Honolulu*, 447 F.3d 2272 (9th Cir. 2005); *Foltz v. State Farm Mutual Auto Ins. Co.*, 331 F.3d 1122, 1134-35 (9th Cir. 2002).

120. *Overstock.com*, 231 Cal. App. 4th at 497.

121. *Id.* at 492; see also *id.* at 497 & cases cited therein on access to irrelevant and inadmissible materials; *id.* at 497 n. 14 (collecting cases on access to irrelevant materials).

122. *H.B. Fuller*, 151 Cal. App. 4th at 893.

123. *Id.*

124. See *id.* at 893-94.

125. *Id.* at 1211 n.27, quoting *Estate of Hearst*, 67 Cal. App. 3d 777, 783, 136 Cal. Rptr. 821 (1977).

facts."¹²⁶ A party to a civil case is entitled to a fair trial, but not necessarily a private one.¹²⁷

When a presumption of access attaches to a judicial record, it is subject to the same constitutional requirements that govern access to civil and criminal proceedings. As the California Supreme Court recently put it, "[u]nder constitutional principles, records of civil and criminal adjudicatory proceedings *must be disclosed to the public* unless there is an overriding interest that supports sealing the record, there is a substantial probability that the interest will be prejudiced by disclosure, the sealing is narrowly tailored to serve the overriding interest, and there is no less restrictive means of achieving the overriding interest."¹²⁸

Importantly, however, the California Supreme Court has been careful *not* to extend the public's right of access beyond the *adjudicative proceedings and filed documents* of trial and appellate courts."¹²⁹ The right of access, whether based on the First Amendment or on common law, applies only to documents that accurately and officially reflect the work of the court, such as its orders and judgments.¹³⁰ There is no right of access to the deliberations and conferences of an appellate court, the trial notes of a trial court judge, or preliminary drafts of orders or opinions, notes, and internal memoranda.¹³¹ As the Court explained in a recent case,

public access to such documents is not generally in the public interest because they are tentative, often wrong, sometimes misleading, they do not speak for the court and do not constitute court action. Furthermore, access to such preliminary writings would severely hamper the users of the materials because their purpose is to extract raw and immature thoughts from the brain to paper, so they can be refined and corrected. *Knowing that such materials could be exposed to the public eye would inhibit their creation.*¹³²

126. *NBC Subsidiary*, 20 Cal. 4th at 1211 n.27 (emphasis added), *quoting Hearst*, 67 Cal. App. 3d at 783.

127. See *NBC Subsidiary*, 20 Cal. 4th at 1211; *McNair v. National Collegiate Athletic Ass'n*, 234 Cal. App. 4th 25, 39, 183 Cal. Rptr. 3d 490 (2015).

128. *Sander*, 58 Cal. 4th at 319 n.7 (emphasis added).

129. *NBC Subsidiary*, 20 Cal. 4th at 1212 (emphasis added).

130. See *Sander*, 58 Cal. 4th at 318, *quoting* *Copley Press, Inc. v. Superior Court*, 6 Cal. App. 4th 106, 113, 7 Cal. Rptr. 2d 84 (1992).

131. *NBC Subsidiary*, 20 Cal. 4th at 1212 n.29.

132. *Sander*, 58 Cal. 4th at 319 (emphasis added; citations and internal quotation marks omitted).

Some court records do not fit cleanly in either of the categories described above; they are “on the margin” and determining the proper treatment of such records entails more complicated analysis.¹³³

Contexts in Which Courts Have Denied First Amendment Access to a Judicial Proceeding or a Judicial Record

In which judicial contexts have courts concluded that there is no First Amendment right of access, or that such a right of access must yield to other, more compelling interests? That is still a fast-developing area of law; while some guidance exists, there remain many questions.

One scenario involves a total prohibition on public access to a particular type of court proceeding, such as a statute providing for closure in a certain context. In *NBC Subsidiary*, the California Supreme Court carefully explained that it was addressing “the right of access to ordinary civil proceedings in general, and *not* any right of access to particular proceedings governed by specific statutes.”¹³⁴ In so doing, it contrasted two different approaches:

- (1) A New Jersey decision in which the court said a per se rule of closure for parental termination proceedings violates the First Amendment right of access.
- (2) A California decision in which the court declined to recognize a First Amendment right of access to juvenile proceedings.¹³⁵

It is not clear how the California Supreme Court would approach those situations, much less what the United States Supreme Court would do. In our extensive, but less-than-exhaustive research in this area, the staff found few examples of court proceedings considered wholly exempt from First Amendment scrutiny — i.e., court proceedings that did not satisfy the 2-prong test for presumptive First Amendment access.

One such example is search warrant proceedings during an ongoing investigation. According to the Ninth Circuit, “the First Amendment does not establish a qualified right of access to search warrant proceedings and materials while a pre-indictment investigation is still ongoing.”¹³⁶ The court explained that

133. See *Sander*, 58 Cal. 4th 300; *Copley Press*, 6 Cal. App. 4th 106.

134. 20 Cal. 4th 1212 n.30 (emphasis added).

135. *Id.* (comparing *Div. of Youth & Fam. Serv. v. J.B.*, 120 N.J. 112, 576 A.2d 261 (1990), with *San Bernardino County Dept. of Public Social Services v. Superior Court*, 232 Cal. App. 3d 188, 283 Cal. Rptr. 332 (1991)).

136. *Times Mirror Co. v. United States*, 873 F.2d 1210, 1216 (9th Cir. 1989); see also *People v. Jackson*, 128 Cal. App. 4th 1009, 27 Cal. Rptr. 3d 596 (2005).

there is “no historical tradition of open search warrant proceedings and materials,” and “public access would hinder, rather than facilitate, the warrant process and the government’s ability to conduct criminal investigations.”¹³⁷

A second example is grand jury proceedings. “Because they have been historically closed and because their functioning depends upon secrecy, the press and public do not have a First Amendment right to attend grand jury proceedings.”¹³⁸ “Nor does the Constitution require access to the transcripts of grand jury proceedings that have been completed.”¹³⁹ Categorical closure is acceptable in these circumstances.

The concerns about grand jury secrecy also apply with regard to proceedings that are ancillary to a grand jury investigation, such as a motion to quash a grand jury subpoena. For example, “motion to quash hearings, and the documents filed in connection therewith, should be closed and sealed *to the extent necessary to prevent disclosure of matters occurring before the grand jury.*”¹⁴⁰ The same is true of any portion of a contempt proceeding that contains discussion of matters occurring before the grand jury.¹⁴¹

But a contempt proceeding that is ancillary to a grand jury investigation is not categorically exempt from First Amendment constraints; some aspects of such a proceeding are subject to a presumptive First Amendment right of access.¹⁴² That right of access is “not unqualified.”¹⁴³ A court “must carefully consider whether closure or sealing is nevertheless required to prevent harm to a compelling interest, which in this context will likely be the need to maintain the secrecy of grand jury information and the need to avoid compromising grand jury investigations.”¹⁴⁴ It may be necessary to redact some information or withhold

137. *Times Mirror*, 128 Cal. App. 4th at 1214, 1215.

138. *Alvarez v. Superior Court*, 154 Cal. App. 4th 642, 652, 64 Cal. Rptr. 3d 854 (2007); see also *Los Angeles Times v. Superior Court*, 114 Cal. App. 4th 247, 256, 263, 7 Cal. Rptr. 3d 524 (2003).

139. *Id.* at 653.

140. *Los Angeles Times*, 114 Cal. App. 4th at 251 (emphasis in original); see also *United States v. Index Newspapers, LLC*, 766 F.3d 1072, 1084 (9th Cir. 2014).

141. *Index Newspapers*, 766 F.3d at 1084 (“[T]here is no First Amendment public right of access to: (1) filings and transcripts relating to motions to quash grand jury subpoenas; (2) the closed portions of contempt proceedings containing discussion of matters occurring before the grand jury; or (3) motions to hold a grand jury witness in contempt.”).

142. See *id.* at 1085 (“[T]he public does have presumptive First Amendment rights of access to: (1) orders holding contemnors in contempt and requiring their confinement; (2) transcripts and filings concerning contemnors’ continued confinement; (3) filings related to motions to unseal contempt files; and (4) filings in appeals from orders relating to the sealing or unsealing of judicial records.”).

143. *Id.*

144. *Id.*

some documents altogether, such as when “seemingly innocuous information [is] so entangled with secrets that redaction will not be effective.”¹⁴⁵

That type of approach is more typical of what the staff found in its research. Instead of a categorical determination that a particular type of judicial proceeding or judicial record fails the threshold 2-prong test for a First Amendment access, courts have found a presumptive right of access, but they have also recognized the existence of one or more competing interests. Such a competing interest might overcome the presumptive right of access and justify closure and/or sealing, so long as (i) the competing interest is sufficiently compelling, (ii) there is a substantial probability the interest will be prejudiced absent closure and/or sealing; (iii) the proposed closure and/or sealing is narrowly tailored to serve the overriding interest; and (iv) there is no less restrictive means of achieving the overriding interest.

For example, in *Lugosch v. Pyramid Co.*,¹⁴⁶ the Second Circuit Court of Appeals “conclude[d] that there exists a qualified First Amendment right of access to documents submitted to the court in connection with a summary judgment motion.”¹⁴⁷ Consequently, the Second Circuit said that “continued sealing of the documents may be justified only with specific, on-the-record findings that sealing is necessary to preserve higher values and only if the sealing order is narrowly tailored to achieve that aim.”¹⁴⁸

The Second Circuit therefore remanded *Lugosch* for a “fact-specific inquiry as to whether (1) the contested documents are subject to attorney-client privilege, and (2) defendants waived the privilege by placing in issue the contents of the privileged information.”¹⁴⁹ The Second Circuit did not state that the attorney-client privilege would necessarily trump the presumptive First Amendment right of access in each instance so long as it had not been waived. However, that straightforward approach appears what the federal magistrate and federal district court used on remand after an intensive document-by-document review of the summary judgment materials.¹⁵⁰

145. *Id.* at 1095.

146. 435 F.3d 110 (2006).

147. *Id.* at 124.

148. *Id.* at 125.

149. *Id.*

150. See *Lugosch v. Congel*, 2006 U.S. Dist. LEXIS 53116 (N.D.N.Y. 2006), *aff'd in part & rejected in part*, 2006 U.S. Dist. LEXIS 26745 (N.D.N.Y. 2006). For a case apparently endorsing a similar approach, see *Diversified Group, Inc. v. Dagerdas*, 217 F.R.D. 152, 162 & n.12 (S.D.N.Y. 2003) (ordering unsealing of documents due to common law right of access; appointing special master to review documents, redact attorney-client communications and provide specific findings to

*Green Mountain Chrysler Plymouth Dodge Jeep v. Crombie*¹⁵¹ is another example of a case in which the court found a presumptive First Amendment right of access, recognized the existence of a competing interest, and proceeded with the multi-part test for determining whether a limitation on a First Amendment right of access is valid. In that case, the federal district court considered plaintiffs' request to redact or seal nearly one fifth of their trial exhibits, take substantial portions of five or more depositions *in camera*, and exclude the press and public from portions of the live testimony of ten witnesses. Plaintiffs contended that "trade secret information by its nature defeats the public's First Amendment right of access."

The court disagreed, explaining that "just as there is no absolute right to public access, there is no absolute right to protect trade secrets from disclosure."¹⁵² The court acknowledged that "protection of trade secrets may have a higher value than a qualified right of access under the First Amendment in certain cases and under certain circumstances"¹⁵³ As in *Lugosch*, the court deemed it necessary to individually assess the facts pertaining to each request for closure or sealing.

But the court's approach was more complex than the one in *Lugosch*. The *Green Mountain* court did not simply check whether a piece of evidence was subject to trade secret protection and whether such protection was waived. Instead, in evaluating "whether trade secret protection exceeds the right of public access" for the matters in question, the court said it would consider "the extent of the closure or sealing sought; the potential damage to the Plaintiffs from disclosure; the significance of the public interest at stake; the extent to which the Plaintiffs intend to prove their case by relying on documents they seek

support redactions; declining to decide whether First Amendment right of access exists but noting that "even if the right applies in the civil context, access to the Summary Judgment Documents requires a privilege review because the existence of privileged attorney-client communications would constitute a 'compelling interest.'").

For a case focusing solely on a clash between the attorney-client privilege and the federal common law right of access to a judicial proceeding, without addressing any "nettlesome" First Amendment issues even in dictum, see *Siedle v. Putnam Investments, Inc.*, 147 F.3d 7, *9-*12 & n.4 (1st Cir. 1998) ("[T]he interest in preserving a durable barrier against disclosure of privileged attorney-client information is shared both by particular litigants and by the public, and it is an interest of considerable magnitude. Indeed, this is precisely the kind of countervailing concern that is capable of overriding the general preference for public access to judicial records.").

151. 2007 U.S. Dist. LEXIS 22095 (D.Vt. 2007).

152. *Id.* at *18.

153. *Id.* at *20.

to withhold from public scrutiny; whether the particular matter is integral or tangential to the adjudication.”¹⁵⁴

The above-described situations are not the only ones in which courts have identified a policy interest that can overcome a presumptive First Amendment right of access. Other contexts in which a need for secrecy may override a First Amendment right of access include, for example, a defendant’s right to a fair trial,¹⁵⁵ privacy interests of a prospective juror,¹⁵⁶ privacy interests in wiretapped conversations,¹⁵⁷ privacy interests in medical information,¹⁵⁸ privacy interests in the interior of a home,¹⁵⁹ the need to safeguard a minor victim’s well-being,¹⁶⁰ ensuring the fair administration of justice,¹⁶¹ enforcement of a binding contractual obligation not to disclose¹⁶² (at least where there is a specific showing of a potential serious injury¹⁶³), protection of a witness from embarrassment or intimidation so extreme that it would traumatize the witness or render the

154. *Id.* at *25.

For other cases recognizing that the interest in protecting a trade secret might override a presumptive First Amendment right of access, see, e.g., *In re Iowa Freedom on Information Council*, 724 F.2d 658, 661 (8th Cir. 1983); *In re Gabapentin Patent Litigation*, 312 F. Supp. 2d 653 (D.N.J. 2004); *Estate of Martin Luther King, Jr., Inc. v. CBS, Inc.*, 184 F. Supp. 2d 1352 (N.D. Ga. 2002).

For another example of a right of access case in which a court looked beyond whether a piece of evidence was privileged and whether such protection was waived, see *Cuadra v. Univision Communications, Inc.*, 2012 U.S. Dist. LEXIS 48431 (D. N.J. 2012) (noting that “[t]he public’s interest — i.e., access to the Court’s reasoning on this matter — is largely protected by providing the legal and factual bases embodied in this Opinion without delving so deeply into protected materials that Ms. Cuadra’s privilege or her counsel work product would be compromised.”). See also *Crystal Grower’s Corp. v. Dobbins*, 616 F.2d 458, 462 (10th Cir. 1980) (keeping materials under seal because “[t]he coincidence of the public’s and plaintiffs’ interest in preserving the attorney-client privilege and the work product doctrine here outweighs the more general public interest in information about disputes in the public courts,” but *limiting the sealing period to five years*).

155. See, e.g., *In re Herald Co.*, 734 F.2d 93, 100 (2d Cir. 1984); *Jackson*, 128 Cal. App. 4th at 1028; *Poughkeepsie Newspapers, Inc. v. Rosenblatt*, 92 A.D.2d 232, 459 N.Y.S.2d 857 (N.Y. App. Div. 1983), *aff’d*, 61 N.Y.2d 1005, 463 N.E.2d 1222, 475 N.Y.S.2d 370 (N.Y. 1984).

156. See *Press-Enterprise I*, 446 U.S. 501, which is described in the discussion of “Leading Decisions on First Amendment Access to Criminal Proceedings” *supra*.

157. See *In re New York Times Co.*, 828 F.2d 110, 116 (2d Cir. 1987).

158. *Oiye v. Fox*, 211 Cal. App. 4th 1036, 1070, 151 Cal. Rptr. 3d 65 (2012) (explaining that medical privacy concerns are not absolute but “the public’s general right of access to court records ... must give way to the public’s concern about the privacy of medical information in this case, particularly when the information appears so tangentially related to the litigation.”).

159. See *Oziel v. Superior Court*, 223 Cal. App. 3d 1284, 1294-1302, 273 Cal. Rptr. 196 (1990).

160. See *Globe*, 457 U.S. 596, which is described in the discussion of “Leading Decisions on First Amendment Access to Criminal Proceedings” *supra*.

161. See *NBC Subsidiary*, 20 Cal. 4th at 1222 n.46.

162. See, e.g., *id.*

163. See *McNair*, 234 Cal. App. 4th at 35; *Universal City Studios, Inc. v. Superior Court*, 110 Cal. App. 4th 1273, 1282, 2 Cal. Rptr. 3d 484 (2003).

witness unable to testify,¹⁶⁴ protection of national security,¹⁶⁵ and a defendant's residual privacy interest in personal information in a probation report.¹⁶⁶

In seeking to balance and protect both a presumptive First Amendment right of access and a competing policy interest such as the ones mentioned above, courts and litigants have sometimes had to engage in costly and time-consuming review and analysis of evidentiary materials. In the criminal prosecution of Michael Jackson, for example, "[t]he trial court and the parties made 'Herculean efforts' to redact documents so that the less prejudicial aspects of the case could be revealed to the public."¹⁶⁷

An Example of a California Statute That Conflicted With the First Amendment Right of Access

Before moving on from the First Amendment to briefly discuss other sources protecting access to the judicial process, it may be helpful to describe *Marriage of Burkle*,¹⁶⁸ a particularly instructive California case. *Burkle* focused on Family Code Section 2024.6, which at the time required a court, upon the request of a party to a divorce proceeding, to seal any pleading that listed and provided the location or identifying information about financial assets and liabilities of the parties. The *Los Angeles Times* and the Associated Press contended that the statute was unconstitutional on its face because it "require[d] trial courts to seal divorce court records without providing for the document-by-document analysis and the threshold inquiries required by the First Amendment."¹⁶⁹

In considering that argument, the Second District Court of Appeal applied the previously discussed 2-prong First Amendment access test to a divorce proceeding. The court did "not doubt that divorce cases in particular and family law in general may produce a greater abundance of situations in which it is appropriate ... to try a particular fact issue privately."¹⁷⁰ The court nonetheless found a presumptive First Amendment right of access, because "the two considerations that require a presumption of openness in substantive courtroom

164. See, e.g., *NBC Subsidiary*, 20 Cal. 4th at 1222 n.46; see also *Jackson*, 128 Cal. App. 4th at 1024.

165. See *NBC Subsidiary*, 20 Cal. 4th at 1222 n.46.

166. See *People v. Connor*, 115 Cal. App. 4th 669, 695-97, 9 Cal. Rptr. 3d 521 (2004).

167. *Jackson*, 128 Cal. App. 4th at 1026.

For a case involving extraordinary efforts to protect a common law right of public access yet also safeguard trade secrets, see *Cardiac Pacemakers, Inc. v. Aspen II Holding Co.*, 2006 U.S. Dist. LEXIS 78254 (D. Minn. 2006). The court did not reach the First Amendment issue. See *id.* at *15 n.5.

168. 135 Cal. App. 4th 1045 (2006).

169. *Id.* at 1050.

170. *Id.* at 1056.

proceedings — historical tradition and the utility or institutional value of open proceedings — apply with equal force in divorce cases as in any other ordinary civil case.¹⁷¹

The court then explained that “the mandatory sealing of presumptively open records is constitutionally permissible only if (1) an overriding interest supports the sealing rule; (2) a substantial probability of prejudice to that interest exists absent the sealing; (3) the sealing required by the statute is narrowly tailored to serve the overriding interest; and (4) no less restrictive means are available to achieve the overriding interest.”¹⁷² The court said that Section 2024.6’s mandatory sealing met the first requirement because it was “supported by constitutionally guaranteed privacy rights.”¹⁷³ In the court’s view, the statute also arguably met the second requirement.¹⁷⁴ But the court concluded that the statute “clearly runs afoul of the third and fourth requirement, because it is *neither narrowly tailored* to serve the privacy interests being protected *nor is it the least restrictive means* of protecting those privacy interests.”¹⁷⁵

The court explained:

[T]he statute closes to public view not only the identifying information that would facilitate identity theft or other financial crimes ... but all information pertaining to any asset, including its existence, its value, the provisions of any agreement relating to the asset, and any contentions that may be made about the resolution of disputes over an asset. In short, much of the information contained in documents as to which sealing is mandated may be completely unrelated to the asserted statutory goal of preventing identity theft and financial crimes.¹⁷⁶

The court also pointed out that the party requesting sealing had “suggest[ed] no reason why redaction [was] not a reasonable alternative to effect the statutory purpose.”¹⁷⁷

Because the statute conflicted with constitutional requirements, the court went on to discuss whether there was a way to reform the statute to save it from invalidation. According to the court, “a court may reform a statute in order to preserve it against invalidation under the Constitution, when [the court] can say

171. *Id.* at 1060.

172. *Id.* at 1063.

173. *Id.*

174. *Id.* at 1064-65.

175. *Id.* at 1053 (emphasis added).

176. *Id.* at 1065-66.

177. *Id.* at 1067.

with confidence that (i) it is possible to reform the statute in a manner that closely effectuates policy judgments clearly articulated by the enacting body, and (ii) the enacting body would have preferred the reformed construction to invalidation of the statute.”¹⁷⁸ The court concluded that those requirements were not met:

[T]he procedures selected by the Legislature — mandating the sealing, on an ex parte basis, of any document containing information on marital assets and liabilities — *were clearly intended to streamline the process of sealing documents in dissolution proceedings by entirely eliminating the need for individualized determinations of good cause to justify a sealing order. However, the streamlining procedure selected by the Legislature — the sine qua non of the statute — is ... incompatible with constitutional requirements.* Further, as the trial court observed, “there is not even a glimmer” of legislative intent to authorize trial court discretion to redact specified financial information, rather than to mandate sealing of entire pleadings....

Moreover, an interpretation of the statute that would render it constitutional would necessarily amount to a wholesale revision of the statute, and would require us to interpret the statute to mean, in some respects, precisely the opposite of what it states. For example, section 2024.6 ... prohibits unsealing “except upon petition to the court and good cause shown.” As the press correctly points out, this provision effectively destroys the presumption of access to court records by automatically sealing them and placing the burden of showing good cause for unsealing them on the party presumptively entitled to access. This burden on the party presumptively entitled to access is, by definition, wholly at odds with the presumption.... The Legislature obviously intended this impermissible result, and we cannot construe the statute contrary to its plain meaning.

To summarize, reforming section 2024.6 to render it constitutional would require us to construe the statute to provide for trial court discretion to redact rather than, as the statutory language provides, mandatory sealing. Alternatively, it would require us to construe section 2024.6 to provide for mandatory redaction of parts of pleadings rather than, as the statutory language states, sealing of entire pleadings, and to determine which parts of the pleading should be automatically redacted. And it would require us to conclude that section 2024.6 does not place the burden of showing good cause for unsealing on the party presumptively entitled to access, when it plainly does exactly that. These constructions of the statute are not in accordance with its plain language, nor do they “closely [effectuate] policy judgments clearly articulated by” the Legislature. Accordingly, it is impossible

178. *Id.* at 1068, *quoting* Kopp v. Fair Political Practices Comm’n, 11 Cal. 4th 607, 660-61, 905 P.2d 1248, 476 Cal. Rptr. 2d 108 (1995).

to discern how the Legislature would have chosen to proceed in light of the constitutional infirmity we have described and we cannot ... reform the statute to preserve its constitutionality.¹⁷⁹

The Second District Court of Appeal thus held that “section 2024.6 is unconstitutional on its face.”¹⁸⁰

The Commission should try to avoid a similar fate for any statute that it drafts in this study.

OTHER RIGHTS OF ACCESS AND RELATED REQUIREMENTS

As we explained at the outset, the First Amendment is not the only basis protecting public access to judicial records and proceedings. There is considerable overlap, but some points are worth making here.

California Constitutional Rights of Access

Like the First Amendment to the United States Constitution, its state counterpart (Article I, Section 2, subdivision (a) of the California Constitution) provides broad access to judicial hearings and records.¹⁸¹ In our extensive research, the staff did not come across any case construing this provision of the California Constitution differently from the First Amendment. Thus, there does not seem to be any need to discuss the state counterpart further.

There is, however, another provision of the California Constitution that does merit some attention. In 2004, the electorate passed a ballot measure (Proposition 59) that “addresses ‘the right of access to information concerning the conduct of the people’s business.’”¹⁸² Specifically, the ballot measure added the following provision (Article I, Section 3(b)) to the California Constitution:

(1) The people have the right of access to information concerning the conduct of the people’s business, and, therefore, the meetings of public bodies and the writings of public officials and agencies shall be open to public scrutiny.

(2) A statute, court rule, or other authority, including those in effect on the effective date of this subdivision, shall be broadly construed if it furthers the people’s right of access, and narrowly construed if it limits the right of access. A statute, court rule, or other authority adopted after the effective date of this subdivision that limits the right of access shall be adopted with findings

179. *Burkle*, 135 Cal. App. 4th at 1068-70 (emphasis added; footnotes & citations omitted).

180. *Id.* at 1049.

181. See *Sander*, 58 Cal. 4th at 319 n.7.

182. *Id.* at 309, quoting Cal. Const. art. I, § 3(b)(1).

demonstrating the interest protected by the limitation and the need for protecting that interest.

(3) Nothing in this subdivision supersedes or modifies the right of privacy guaranteed by Section 1 or affects the construction of any statute, court rule, or other authority to the extent that it protects that right of privacy

(4) Nothing in this subdivision supersedes or modifies any provision of this Constitution

(5) This subdivision does not repeal or nullify, expressly or by implication, any constitutional or statutory exception to the right of access to public records or meetings of public bodies that is in effect on the effective date of this subdivision, including, but not limited to, any statute protecting the confidentiality of law enforcement and prosecution records.

....

This provision “ground[s] the presumption of openness in civil court proceedings with state constitutional roots.”¹⁸³ Of particular importance is Section 3(b)(2), which does two key things:

- (1) It establishes a statutory rule of construction under which a statute shall be *broadly* construed if it *further*s the people’s right of access, and *narrowly* construed if it *limits* the right of access.¹⁸⁴
- (2) It says that any statute limiting the right of access “shall be adopted *with findings* demonstrating the interest protected by the limitation and the need for protecting that interest.”¹⁸⁵

The Commission should bear both of these requirements in mind as it drafts legislation in this study.

California Rules of Court 2.550 and 2.551: Sealing a Record in a Trial Court

As a result of the California Supreme Court’s decision in *NBC Subsidiary*, “the Judicial Council promulgated the sealed records rules, effective January 1, 2001.”¹⁸⁶ The key rules applicable to trial courts (California Rules of Court 2.550 and 2.551) are attached for convenient reference.¹⁸⁷ The key rules applicable to reviewing courts (California Rules of Court 8.45 to 8.47) are also attached and are discussed later in this memorandum.¹⁸⁸

183. *Savaglio*, 149 Cal. App. 4th at 597.

184. For cases applying this rule of construction, see, e.g., *Sander*, 58 Cal. 4th at 312-13; *Overstock.com*, 231 Cal. App. 4th at 497; *Alvarez*, 154 Cal. App. 4th at 657.

185. Cal. Const. art. I, § 3(b)(2) (emphasis added).

186. *Mercury Interactive*, 158 Cal. App. 4th at 84.

187. See Exhibit pp. 1-7.

188. See Exhibit pp. 8-19.

With some limitations, Rules 2.550 and 2.551 “apply to records sealed or proposed to be sealed by court order.”¹⁸⁹ Importantly, they “do not apply to records that are required to be kept confidential by law.”¹⁹⁰ These sealed record rules are also inapplicable to a discovery motion or a record filed or lodged in connection with a discovery motion or proceeding.¹⁹¹ But they “do apply to discovery materials that are used at trial or submitted as a basis for adjudication of matters other than discovery motions or proceedings.”¹⁹²

The sealed record rules “expressly implement the First Amendment principles established in *NBC Subsidiary*”¹⁹³ Unless confidentiality is required by law, a trial court record is “presumed to be open.”¹⁹⁴ “A record must not be filed under seal without a court order.”¹⁹⁵

Rules 2.550 and 2.551 spell out a detailed procedure for sealing a trial court record. We do not go into all of the details here. In short, the procedure generally involves “lodging” the record in question with the trial court. “A ‘lodged’ record is a record that is temporarily placed or deposited with the court, but not filed.”¹⁹⁶ The trial court holds it conditionally under seal pending decision on whether to officially file and seal it.¹⁹⁷

If the party lodging the record wants to have it sealed, that party must file a motion or application for an order sealing the record.¹⁹⁸ The party must also submit a supporting memorandum and “a declaration containing facts sufficient to justify the sealing.”¹⁹⁹ The party must serve a copy of the motion or application “on all parties that have appeared in the case.”²⁰⁰

The procedure is slightly different if a party wants to introduce or otherwise use a record that it obtained through discovery, that record is subject to a confidentiality agreement or protective order, and the party does not intend to ask the trial court to seal the record. In that case, the party must:

189. Cal. R. Ct. 2.550(a)(1).

190. Cal. R. Ct. 2.550(a)(2).

191. See Cal. R. Ct. 2.550(a)(3).

192. *Id.*

193. *Overstock.com*, 231 Cal. App. 4th at 486.

194. Cal. R. Ct. 2.550(c).

195. Cal. R. Ct. 2.551(a).

196. Cal. R. Ct. 2.550(b)(3).

197. *McNair*, 234 Cal. App. 4th at 32.

198. Cal. R. Ct. 2.551(b)(1).

199. *Id.*

200. Cal. R. Ct. 2.551(b)(2).

- Lodge the record with the court in unredacted form, along with any pleading, memorandum, declaration, or other document that discloses the content of the record.²⁰¹
- File a redacted version of the record and any document that discloses the content of the record.²⁰²
- “Give written notice to the party that produced the recor[d] that the recor[d] and the other documents lodged ... will be placed in the public court file unless that party files a timely motion or application to seal the recor[d]”²⁰³

The party that produced the record then has ten days to file a motion or application for an order sealing the record.²⁰⁴

In either situation, when a party files a motion or application for an order sealing a record, the trial court may seal the record only if the court expressly finds facts that establish:

- (1) There exists an overriding interest that overcomes the right of public access to the record;
- (2) The overriding interest supports sealing the record;
- (3) A substantial probability exists that the overriding interest will be prejudiced if the record is not sealed;
- (4) The proposed sealing is narrowly tailored; and
- (5) No less restrictive means exists to achieve the overriding interest.²⁰⁵

An order sealing a record must “[s]pecifically state the facts that support the findings”²⁰⁶ and “[d]irect the sealing of only those documents and pages, or if reasonably practicable, portions of those documents and pages, that contain the material that needs to be placed under seal.”²⁰⁷

If a trial court denies a motion or application to seal a record, “the clerk must return the lodged record to the submitting party”²⁰⁸ The trial court “must not place it in the case file unless that party notifies the clerk in writing within 10 days after the order denying the motion or application that the record is to be filed.”²⁰⁹

201. Cal. R. Ct. 2.551(b)(3)(A)(i).

202. Cal. R. Ct. 2.551(b)(3)(A)(ii).

203. Cal. R. Ct. 2.551(b)(3)(A)(iii).

204. Cal. R. Ct. 2.551(b)(3)(B).

205. Cal. R. Ct. 2.550(d).

206. Cal. R. Ct. 2.550(e)(1)(A).

207. Cal. R. Ct. 2.550(e)(1)(B).

208. Cal. R. Ct. 2.551(b)(6).

209. *Id.*

California Rules of Court 8.45, 8.46, and 8.47: Sealing a Record in a Reviewing Court

The rules governing sealing of a record in a reviewing court (Rules 8.45, 8.46, and 8.47) are similar to, but more complex and detailed than, the ones governing sealing of a record in a trial court.²¹⁰ We describe them only briefly here.

The treatment of a record in a reviewing court varies depending on its nature:

- A record sealed by the trial court “must remain sealed unless the reviewing court orders otherwise”²¹¹
- “A record filed or lodged publicly in the trial court and not ordered sealed by that court must *not* be filed under seal in the reviewing court.”²¹²
- A record that was not filed in the trial court “may be filed under seal in the reviewing court *only* by order of the reviewing court.”²¹³ The standard for sealing a record in a reviewing court is the same as the standard for sealing a record in a trial court: The reviewing court “may order a record filed under seal only if it makes the findings required by rule 2.550(d)-(e),”²¹⁴ which are based on the California Supreme Court’s decision in *NBC Subsidiary*.²¹⁵
- Special rules apply to a “confidential” record — i.e., a record that, “in court proceedings, is required by statute, rule of court, or other authority except a [sealing order] to be closed to inspection by the public or a party.”²¹⁶ The procedural specifics vary depending on whether the “confidential” record does or does not relate to an “in-camera hearing at which the defendant was present but from which the People were excluded in order to prevent disclosure of information about defense strategy or other information to which the prosecution was not allowed access at the time of the hearing.”²¹⁷

We will discuss Rules 8-45-8.47 in greater detail later in this study, as needed.

Common Law Right of Access to Court Proceedings and Judicial Records

“Nearly all jurisdictions, including California, have long recognized a common law right of access to public documents, including court records.”²¹⁸ “The federal courts have similarly recognized a common law right of public

210. See Exhibit pp. 8-19.

211. Cal. R. Ct. 8.46(b)(1).

212. Cal. R. Ct. 8.46(c) (emphasis added).

213. Cal. R. Ct. 8.46(d)(1) (emphasis added).

214. Cal. R. Ct. 8.46(d)(6).

215. Cal. R. Ct. 8.46 Advisory Committee Comment.

216. Cal. R. Ct. 8.46(b)(5).

217. Cal. R. Ct. 8.47(b)(1)(B). Compare Cal. R. Ct. 8.47(b) with Cal. R. Ct. 8.47(c).

218. *Overstock.com*, 231 Cal. App. 4th at 483.

access to government documents, although the parameters of the right have not been clearly established.”²¹⁹

Comparison of the First Amendment Right of Access With the Common Law Right of Access

“The First Amendment is generally understood to provide a *stronger* right of access than the common law.”²²⁰ In general, then, if a court finds that the First Amendment standard is satisfied, it “will necessarily find that ... the common law standard [is satisfied] as well.”²²¹

Accordingly, when courts decide issues concerning access to judicial proceedings, they usually resolve those issues “on First Amendment grounds rather than on the less protective common law basis.”²²² For example, since the California Supreme Court’s decision in *NBC Subsidiary*, “the California Courts of Appeal have regularly employed a constitutional analysis in resolving disputes over public access to court documents.”²²³

In a similar vein, **it seems advisable for the Commission to focus on the First Amendment requirements in drafting legislation for this study.** If the proposed legislation would comply with the First Amendment requirements on public access to judicial records and proceedings, that legislation likely would also comply with the common law right of public access. Moreover, legislation could override the common law right in the event of a conflict, but legislation must comply with the First Amendment requirements or it will not be valid.

It is worth noting, however, the First Amendment right of access to judicial records “is limited to records of adjudicatory proceedings.”²²⁴ In contrast, the common law right of access “applies to all three branches of government and is not limited to adjudicatory records.”²²⁵

Application of the Common Law Right of Access to a Mediation

In the course of our research, the staff did not find a case that involved the intersection of mediation confidentiality and the First Amendment right of

219. *Sander*, 58 Cal. 4th at 317 n.6; see, e.g., *Nixon v. Warner Communications, Inc.*, 435 U.S. 589 (1978).

220. *United States v. Business of the Custer Battlefield Museum*, 658 F.3d 1188, 1197 n.2 (9th Cir. 2011) (emphasis added); see also *Erie County*, 763 F.3d at 239.

221. *Connor*, 115 Cal. App. 4th at 486.

222. *United States v. Kaczynski*, 154 F.3d 930, 932-33 (9th Cir. 1998) (Reinhardt, J., concurring).

223. *Overstock.com*, 231 Cal. App. 4th at 485.

224. *Sander*, 58 Cal. 4th at 308.

225. *Id.*

access. We did, however, find a recent decision that involved the intersection of mediation confidentiality and the federal common law right of access.

That decision, *In re Fort Totten Metrorail Cases*,²²⁶ involved a motion by the *Washington Post* for access to certain court records in a lawsuit arising from a train collision. Among other things, the *Post* sought access to documents relating to two different mediations, which we will refer to as “Mediation #1” and “Mediation #2.”

With regard to Mediation #1, the federal district court said that the requested documents “qualify as judicial records subject to the common law right of access because they were filed with the Court and were the subjects of judicial action.”²²⁷ Consequently, the “starting point” for the court’s analysis was a strong presumption in favor of public access. The court examined six factors that might act to overcome that presumption:

- (1) The need for public access to the documents at issue.
- (2) The extent of previous public access to the documents.
- (3) The fact that someone has objected to disclosure, and the identity of that person.
- (4) The strength of any property and privacy interests asserted.
- (5) The possibility of prejudice to those opposing disclosure.
- (6) The purpose for which the documents were introduced during the judicial proceedings.²²⁸

Among other things, the court considered “the importance of maintaining confidentiality over the mediation process because of the Local Rule requiring such confidentiality and because of the policy goal of promoting candor in settlement negotiations.”²²⁹ The court concluded, however, that “these interests [were] not actually implicated by disclosure of the sealed records at issue ... because the records do not reveal previously-undisclosed statements made during confidential mediations, but rather contain statements ... which were aired on television and published on the internet.”²³⁰ Relying primarily on that

226. 960 F. Supp. 2d 2 (D.D.C. 2013), *appeal dismissed*, 2013 U.S. App. LEXIS 25960 (D.C. Cir. 2013).

227. *Id.* at 6.

228. *Id.* The six-factor rubric stemmed from *United States v. Hubbard*, 650 F.2d 293 (D.C. Cir. 1980).

229. *Fort Totten*, 960 F. Supp. 2d at 13.

230. *Id.*

point, the court concluded that the requested documents from Mediation #1 should be unsealed.²³¹

The court applied the same six-factor approach to Mediation #2. Again, the court concluded that the requested documents should be unsealed. Here, however, the determinative factor appeared to be that “the Corporate Defendants wanted the Court to enforce a purported settlement agreement reached during Mediation #2.”²³² The court explained that “when litigants ‘call on the courts’ to resolve disputes, ‘they must accept the openness that goes with subsidized dispute resolution by public (and publicly accountable) officials, for ‘[j]udicial proceedings are public rather than private property.’”²³³

The *Fort Totten* court thus essentially found a waiver of mediation confidentiality in both Mediation #1 and Mediation #2, which appeared to dictate the conclusion in favor of public access.

IMPLICATIONS FOR THE COMMISSION’S STUDY

What are the implications of the above-described body of law for the Commission’s study? We discuss that matter below.

Introduction

Any statute the Commission drafts in this study will be subordinate to the federal and state constitutions.²³⁴ Consequently, in preparing its proposed legislation, the Commission must be careful to comply with the First

231. See *id.*

232. *Id.* at 14.

233. *Id.*, quoting *Union Oil Co. v. Leavell*, 220 F.3d 562, 568 (7th Cir. 2000). See also *Bank of America National Trust & Svcs. Ass’n v. Hotel Rittenhouse*, 800 F.2d 339 (3d Cir. 1986), in which the court explained: “[H]aving undertaken to utilize the judicial process to interpret the settlement and to enforce it, the parties are no longer entitled to invoke the confidentiality ordinarily accorded settlement agreements. Once a settlement is filed in the district court, it becomes a judicial record, and subject to the access accorded such records.” *Id.* at 345.

In contrast, in a post-consent decree conference conducted in chambers, the court “will not be adjudicating anyone’s rights or enforcing any provision of the consent decree.” *B.H. v. McDonald*, 49 F.3d 294, 300 (7th Cir. 1995). Such a conference “require[s] a certain degree of give-and-take negotiation,” in which “candor and free flow of discussion” is useful. *Id.* at 301. The Seventh Circuit thus concluded that “public scrutiny of [such] in-chambers conferences could undermine their very function,” so “the public has no right of access under *Press-Enterprise*.” *Id.*; but see *United States v. Erie County*, 763 F.3d 235, 236 (2d Cir. 2014) (concluding that compliance reports filed pursuant to settlement agreement “are not documents made in preparation for settlement,” so “many of the privacy concerns that inhere in pre-settlement negotiations simply do not apply” and compliance reports should not be sealed).

234. See U.S. Const. art. VI, § 2; Cal. Const. art II, § 1.

Amendment and the California constitutional provisions on public access to judicial records and proceedings.

Those provisions would not be of any concern if the proposed legislation creating a new exception to California's mediation confidentiality statute would freely permit public access to judicial records and proceedings in a legal malpractice case or State Bar disciplinary proceeding that alleges mediation misconduct. In that circumstance, there would be no restriction on public access and thus no grounds for an attack based on a lack of access.

Because there would be no restriction on public access, however, any mediation communication disclosed in the course of such a case or proceeding would become public and no longer be private to any degree. If so framed, then, the Commission's proposed new exception would essentially mean that mediation confidentiality dissolves upon a "mere allegation" of mediation misconduct, just as many commenters have forewarned in the course of this study. In other words, the balance between the policy interest in attorney accountability and the policy interests served by mediation confidentiality would tilt completely towards attorney accountability.

The staff's impression, however, is that the Commission is attempting to follow more of a compromise approach, which preserves a measure of protection for mediation communications when a mediation participant alleges mediation misconduct. In large part, we base that impression on the Commission's decision to use an *in camera* screening process.

The Commission could structure such a process in many different ways²³⁵ and we are not sure precisely what the Commissioners had in mind. Presumably, however, the intent would be to preserve some degree of mediation confidentiality (at least vis-à-vis the public, and perhaps also vis-à-vis a mediation participant who was not privy to the mediation communication in question) unless and until a court determines that disclosure is appropriate.²³⁶

If that is the Commission's intent, then using an *in camera* screening process to determine the admissibility of mediation communications would not by itself be sufficient to achieve the intended result. As discussed earlier in this memorandum, a legal malpractice case or State Bar disciplinary proceeding alleging mediation misconduct is likely to involve a *panoply* of issues relating to

235. See Memorandum 2015-55, pp. 5-6.

236. See generally Alan Kirtley, *The Mediation Privilege's Transition from Theory to Implementation: Designing a Mediation Privilege Standard to Protect Mediation Participants, the Process and the Public Interest*, J. Disp. Resol. 1, 51-51 (1995).

the use of mediation communications, from the pleading stage or other early stages throughout the entire adjudication process.²³⁷ Once a mediation communication is disclosed to the public, such as in a complaint or other pleading, confidentiality is lost and there is no way to fully retrieve or restore it. In other words,

Once persons not within the ambit of [a] confidential relationship have knowledge of [a] communication, that knowledge cannot be undone. One cannot "unring" a bell.²³⁸

Accordingly, if there is to be any meaningful protection for mediation communications in a legal malpractice case or State Bar disciplinary proceeding alleging mediation misconduct, *such protection may have to apply at the inception of the matter and continue until an appropriate endpoint (if any)*. In all likelihood, relatively little could be achieved *solely* by using an *in camera* screening process for purposes of determining admissibility.

Thus, for instance, in *Olam v. Congress Mortgage Co.*, Magistrate Judge Brazil noted that if a California court heard *in camera* testimony from a mediator, that testimony should "perhaps [be] subject to a sealing or protective order"²³⁹ Similarly, a Texas provision on mediation confidentiality refers not only to conducting an *in camera* hearing, but also to issuing a protective order:

(e) If this section conflicts with other legal requirements for disclosure of communications, records, or materials, the issue of confidentiality may be presented to the court having jurisdiction of the proceedings *to determine, in camera, whether the facts, circumstances, and context* of the communications or materials sought to be disclosed *warrant a protective order* of the court or whether the communications or materials are subject to disclosure.²⁴⁰

237. See discussion of "Current Contours of the Proposed New Exception" *supra*.

238. Federal Deposit Ins. Corp. v. Singh, 140 F.R.D. 252, 253 (D. Maine 1992). See also *International Digital Systems Corp. v. Digital Equipment Corp.*, 120 F.R.D. 445, 449 (D. Mass. 1988), in which the court explained:

It cannot be doubted that the confidentiality of the document has been destroyed by the ... disclosure ...; it equally cannot be doubted that the confidentiality of the communication can never be restored In other words, ... there is no order I can enter which erases from defendant's counsel's knowledge what has been disclosed. There is no order which can remedy what has occurred

239. 68 F. Supp. 2d 1110, 1132 (N.D. Cal. 1999).

240. Tex. Civ. Prac. & Rem. Code § 154.073(e).

Likewise, some scholars have suggested the use of sealing orders in conjunction with *in camera* hearings in the mediation confidentiality context.²⁴¹ The Commission itself discussed that concept at its meeting in August 2015: It focused on the possibility of directing a litigant to (1) publicly file only a barebones complaint alleging mediation misconduct, but also (2) submit under seal a more detailed set of allegations, which would disclose mediation communications as needed to effectively plead the claim. More recently, mediator Lee Blackman urged the Commission to follow an integrated approach that combines the use of *in camera* hearings, sealing orders, and protective orders throughout the litigation process.²⁴²

For these reasons, the staff presumes that the Commissioners are considering using a combination of such judicial techniques, so as to preserve a measure of protection for mediation communications while also holding attorneys accountable for mediation misconduct. If that is correct, then it is important to consider how to structure a proposal along those lines in compliance with the constitutional provisions on public access to judicial records and proceedings.

That is challenging, because the constitutional doctrines on public access are still developing and it is hard to predict what the courts will do in the future. The basic constitutional rubric is fairly clear, however, and the Commission should attempt to decide how it would apply in the contexts at hand:

- (1) A legal malpractice case that alleges mediation misconduct.
- (2) An attorney disciplinary proceeding that alleges mediation misconduct.

To help streamline the discussion and present it in a clear manner, the remainder of this memorandum focuses on the first context: a legal malpractice case that alleges mediation misconduct. A later memorandum will address the second context, after the Commission provides guidance on the issues discussed here.

241. See Rebecca Hiers, *Navigating Mediation's Uncharted Waters*, 57 Rutgers L. Rev. 531, 578 (2005) ("Establishment of a well-defined process for judicial review of mediated agreements, if challenged for duress, fraud, or other misconduct, ... could be very helpful. Such a process could ensure that such a review would be held *in camera* and also would allow the parties to request to have that record sealed, if appropriate."); Scott Hughes, *The Uniform Mediation Act: To the Spoiled Go the Privileges*, 85 Marq. L. Rev. 9, 77 (2001) ("[P]rocedural step prior to accessing [mediation] testimony (such as an *in camera* hearing or sealed proceedings) is appropriate").

242. Mr. Blackman's proposal is attached to Memorandum 2015-55 as Exhibit pages 1-6. It is described in detail at pages 36-40 of that memorandum.

Application of the Constitutional Rubric to a Legal Malpractice Case That Alleges Mediation Misconduct

The constitutional rubric for access to judicial records and proceedings starts with the 2-prong test examining “(i) historical tradition, and (ii) the specific structural utility of access in the circumstances.”²⁴³ If that test establishes the existence of a presumptive First Amendment right of access, the First Amendment generally requires that “*before* substantive courtroom proceedings are closed or transcripts are ordered sealed, a trial court must hold a hearing and expressly find that (i) there exists an overriding interest supporting closure and/or sealing; (ii) there is a substantial probability that the interest will be prejudiced absent closure and/or sealing; (iii) the proposed closure and/or sealing is narrowly tailored to serve the overriding interest; and (iv) there is no less restrictive means of achieving the overriding interest.”²⁴⁴

Application of the 2-Prong Test for a Presumptive First Amendment Right of Access

How would the 2-prong test focusing on historical tradition and structural utility apply to a legal malpractice case that alleges mediation misconduct? We discuss each prong of the test below.

(1) Historical Tradition

A legal malpractice case is a type of civil case. As the United States Supreme Court noted in *Richmond Newspapers*, “historically, both civil and criminal trials have been presumptively open.”²⁴⁵ That tradition is longstanding, with roots in ancestral England. “[O]ne of the most conspicuous features of English justice, that *all* judicial trials are held in open court, to which the public have free access, ... appears to have been the rule in England from time immemorial.”²⁴⁶ Consistent with that historical tradition, California enacted Code of Civil Procedure Section 124 in 1872 and has not amended it since. The provision says simply: “Except as provided in Section 214 of the Family Code, or any other provision of law, *the sittings of every court shall be public.*”²⁴⁷

The staff is not aware of any authority applying different treatment to legal malpractice cases. To the contrary, the proceedings in such legal malpractice

243. *NBC Subsidiary*, 20 Cal. 4th at 1218-19.

244. *Id.* at 1218 (emphasis in original; footnotes omitted).

245. 448 U.S. at 580 n.17 (plurality opin. by Burger, C.J.).

246. *Publicker*, 733 F.2d at 1069, *quoting* E. Jencks, *The Book of English Law* 73-74 (6th ed. 1967) (emphasis in *Publicker*).

247. Emphasis added.

cases as *Cassel v. Superior Court*²⁴⁸ and *Wimsatt v. Superior Court*,²⁴⁹ which involved allegations of mediation misconduct, were not shielded from public view. The same appears to have been true in many other legal malpractice cases litigated here in California²⁵⁰ and elsewhere in the country.²⁵¹

Thus, California courts are likely to conclude that there is a historical tradition of public access to a legal malpractice case, including a legal malpractice case that alleges mediation misconduct. While we could research and document this point more thoroughly, that does not appear to be a productive use of the staff's limited resources at this time. If anyone disagrees with the above conclusion, it would be helpful to hear why and to know which sources would support an alternative view.

(2) Specific Structural Utility of Public Access in the Circumstances

The second prong of the test for a presumptive right of access examines “the specific structural utility of access in the circumstances.”²⁵² In other words, a court is to consider “whether access to a particular government process is important *in terms of that very process*.”²⁵³

“Public access to civil trials, no less than criminal trials, plays an important role in the participation and the free discussion of governmental affairs.”²⁵⁴ In *NBC Subsidiary*, the California Supreme Court explained that

public access to civil proceedings serves to (i) demonstrate that justice is meted out fairly, thereby promoting public confidence in such governmental proceedings; (ii) provide a means by which citizens scrutinize and check the use and possible abuse of judicial power; and (iii) enhance the truthfinding function of the proceeding.²⁵⁵

Those considerations would seem to apply to a similar degree to a legal malpractice case as to civil proceedings generally.

248. 51 Cal. 4th 113, 244 P.3d 1080, 119 Cal. Rptr. 3d 437 (2011).

249. 152 Cal. App. 4th 137, 61 Cal. Rptr. 3d 200 (2007).

250. See, e.g., *Viner v. Sweet*, 30 Cal. 4th 1232, 70 P.3d 1046, 135 Cal. Rptr. 2d 629 (2003); *Jordache Enterprises v. Brobeck, Phleger & Harrison*, 18 Cal. 4th 739, 958 P.2d 1062, 76 Cal. Rptr. 2d 749 (1999); *Budd v. Nixen*, 6 Cal. 3d 195, 491 P.2d 433, 98 Cal. Rptr. 849 (1971).

251. See, e.g., *Dombrowski v. Bulson*, 19 N.Y.3d 347, 971 N.E.2d 338, 948 N.Y.S.2d 208 (2012); *Akin, Gump, Strauss, Hauer & Feld, LLP v. National Development & Research Corp.*, 299 S.W.3d 106 (Texas S.Ct. 2009); *Christy v. Saliterman*, 288 Minn. 144, 179 N.W.2d 288 (1970).

252. *NBC Subsidiary*, 20 Cal. 4th at 1218.

253. *Richmond Newspapers*, 448 U.S. at 589 (Brennan, J., concurring) (emphasis added).

254. *Publicker*, 733 F.2d at 1070.

255. 20 Cal. 4th at 1219.

In fact, one could argue that public access to a legal malpractice case is especially important in promoting public confidence in the justice system, because an attorney is an officer of the court. Being able to observe the proceedings and inspect the records when an attorney is accused of wrongdoing might help to assure citizens that members of the State Bar will be held accountable for misconduct. Providing such access might therefore enhance public perceptions of lawyers in good standing and the role that those lawyers play in the court system and the administration of justice.

The staff thus suspects that California courts would find that public access has “specific structural utility” in a legal malpractice case. There does not appear to be any good reason to differentiate a legal malpractice case from other types of civil cases in that regard.

One could contend, however, that a legal malpractice case alleging mediation misconduct is a special situation. In particular, one could argue that

- (1) Disclosure of mediation communications in such a case might have a negative impact on the effectiveness of future mediations, for the many reasons advanced by numerous sources in the course of this study, and
- (2) Due to that negative impact, judicial workloads will increase and courts will be less able to mete out justice promptly and fairly, in all types of cases, including legal malpractice cases that allege mediation misconduct.

Those potential counterproductive effects would weigh against the positive impacts described above. It is difficult to predict, however, whether courts will assess “the specific structural utility of access” by focusing specifically on legal malpractice cases alleging mediation misconduct, instead of considering legal malpractice cases generally.

Overall Balance

While it is possible that a court might conclude the overall balance under the 2-prong constitutional test tips against public access, there is no assurance of this. The staff’s gut feeling, based on the reasons discussed above and the many First Amendment access cases we have read, is that California courts would find a presumptive First Amendment right of access to a legal malpractice case, including a legal malpractice case alleging mediation misconduct. We believe it

would be risky for the Commission to assume otherwise in drafting its proposed legislation for this study.

Consequences of Finding a Presumptive First Amendment Right of Access

If the above analysis is correct, then any legislation restricting public access to court proceedings and judicial records in such a case would have to satisfy the multi-part test for determining whether a limitation on a First Amendment right of access is valid. In other words, the legislation would have to be framed such that “(i) there exists an overriding interest supporting closure and/or sealing; (ii) there is a substantial probability that the interest will be prejudiced absent closure and/or sealing; (iii) the proposed closure and/or sealing is narrowly tailored to serve the overriding interest; and (iv) there is no less restrictive means of achieving the overriding interest.”²⁵⁶

How should the Commission go about framing such legislation? To answer that question, let us begin by considering the first requirement: To justify the use of a judicial technique that restricts public access, there must be “an overriding interest” that supports the approach.

Is Mediation Confidentiality an “Overriding Interest” That Would Support a Limitation on Public Access?

Would courts consider mediation confidentiality an “overriding interest” that could justify a limitation on public access to records or proceedings in a legal malpractice case that alleges mediation misconduct?

Throughout this study, the Commission has heard much about the importance of mediation confidentiality. As the California Supreme Court noted in *Cassel*, a “principal purpose” of California’s mediation confidentiality legislation “is to assure prospective [mediation] participants that their interests will not be damaged, first, by attempting this alternative means of resolution, and then, once mediation is chosen, by making and communicating the candid disclosures and assessments that are most likely to produce a fair and reasonable mediation settlement.”²⁵⁷ The basic tenets of the underlying theory are:

- (1) Confidentiality promotes candor in mediation.
- (2) Candid discussions lead to successful mediation.
- (3) Successful mediation encourages future use of mediation to resolve disputes.

256. *Id.* at 1218 (emphasis in original; footnotes omitted).

257. 51 Cal. 4th at 131.

(4) The use of mediation to resolve disputes is beneficial to society.²⁵⁸

While some of these points are difficult, if not impossible, to prove empirically, they are grounded in common sense,²⁵⁹ supported by Congress,²⁶⁰ embraced in legislation or court rule in virtually every state and federal jurisdiction (including the Uniform Mediation Act or “UMA”),²⁶¹ and widely accepted by courts²⁶² and legal scholars across the country.²⁶³ In short, there is broad consensus that “confidentiality is essential to effective mediation,”²⁶⁴ and much support for the notion that

[i]n appropriate cases mediation provides parties with a simplified and economical procedure for obtaining prompt and equitable resolution of their disputes and a greater opportunity to participate directly in resolving these disputes. Mediation may also assist to reduce the backlog of cases burdening the judicial system. It is in the public interest for mediation to be encouraged and used where appropriate by the courts.²⁶⁵

Given the widespread recognition of the importance of mediation confidentiality, it seems likely that courts will consider it on a par with the attorney-client privilege, evidentiary protection for trade secrets, privacy interests of a prospective juror, and other policy interests²⁶⁶ that courts have found sufficiently compelling to override a presumptive First Amendment right of access. In other words, if the Commission proposes legislation that calls for use of a judicial technique that restricts public access to some aspect of a legal malpractice case alleging mediation misconduct, it appears likely, though by no

258. See Memorandum 2014-6, pp. 4-9.

259. See Memorandum 2015-5.

260. See *Blackmon-Malloy v. United States Capitol Police Bd.*, 575 F.3d 699, 711 (D.C. Cir. 2009) (“Congress understood what courts and commentators acknowledge, namely, that confidentiality plays a key role in the informal resolution of disputes.”); see also *Fields-D-Arpino v. Restaurants Associates, Inc.*, 39 F. Supp. 2d 412, 417 (S.D.N.Y. 1999) (“Congress’ view on the importance of alternative dispute resolution, and the need for confidentiality is equally clear.”).

261. See, e.g., First Supplement to Memorandum 2014-35, p. 3; National Conference of Commissioners on Uniform State Laws, *Uniform Mediation Act*, Introduction to Prefatory Note (as amended in 2003); 28 U.S.C. § 652(d).

262. See, e.g., *Beazer East, Inc. v. Mead Corp.* 412 F.3d 429, 435 (3d Cir. 2005); *Sheldone v. Pennsylvania Turnpike Comm’n*, 104 F. Supp. 2d 511 (W.D. Pa. 2000); *Folb v. Motion Picture Industry Pension & Health Plans*, 16 F. Supp. 2d 1164 (C.D. Cal. 1998), *aff’d without opinion*, 216 F.3d 1082 (9th Cir. 2000).

263. See Memorandum 2015-23, pp. 6-9.

264. *Foxgate Homeowners’ Ass’n v. Bramalea California, Inc.*, 26 Cal. 4th 1, 14, 25 P.3d 1117, 108 Cal. Rptr. 2d 642 (2001).

265. Code Civ. Proc. § 1775.

266. See discussion of “Contexts in Which Courts Have Denied First Amendment Access to a Judicial Proceeding or Judicial Record” *supra*.

means certain, that the legislation would satisfy the constitutional requirement of “an overriding interest” supporting the limitation on public access.

Assuming that the Commission’s proposal would incorporate *in camera* screening and/or other judicial techniques that would limit public access, the Commission could bolster the likelihood of meeting the “overriding interest” requirement by including some legislative findings about the importance of mediation confidentiality. We further explore that possibility below, as we continue our discussion of how the First Amendment requirements would apply to a limitation on public access in a legal malpractice case based on mediation misconduct.

Is There a Substantial Probability That the Policy Interest in Mediation Confidentiality Will be Prejudiced Absent a Limitation on Public Access?

In the multi-part constitutional test for determining the validity of a limitation on public access, the next requirement is to show “a substantial probability” that the “overriding interest” will be prejudiced absent the limitation on public access. Thus, it is important to examine the potential consequences of disclosing confidential mediation communications.

As previously discussed, once a confidential communication is publicly disclosed, or disclosed to persons for whom it was not intended, it is impossible to “unring the bell.”²⁶⁷ For instance, if a celebrity confessed during a mediation that he was on the verge of bankruptcy, and that information subsequently became public, the harm to his reputation and ability to obtain credit would be immediate and impossible to undo. Similarly, if an individual confided during a mediation that her memory was impaired, and that information was subsequently disclosed to her boss (and others), it would be impossible for her boss to set aside that knowledge; it almost certainly would have an impact on the boss’s perceptions of the employee.

Commonsense suggests that if peoples’ mediation communications come back to bite them, as in the above examples, they might not be as likely to use mediation in the future, or to be as candid if they do agree to mediate again. That negative impact probably will be magnified if they tell others about their experiences, as seems likely.

Thus, if the Commission proposes legislation limiting public access to some aspect of a legal malpractice case that alleges mediation misconduct, courts later

267. See discussion in “Introduction” *supra*.

examining that legislation probably would say there is “a substantial probability” that the policy interests underlying mediation confidentiality would be prejudiced absent the limitation on public access. Again, the staff is far from certain of this result, but it strikes us as the most probable conclusion.

With regard to this constitutional requirement, as with the preceding one, some legislative findings might be useful. To meet the constitutional requirements, however, those findings would have to reflect strong support for the concept of mediation confidentiality, perhaps stronger than the members of the Commission would be comfortable with.

For example, the Commission could include some language along the following general lines:

Evid. Code § 1130 (added). Legislative findings

1130. The Legislature finds and declares:

(a) As described in Code of Civil Procedure Section 1775, it is in the public interest for mediation to be encouraged and used where appropriate by the courts.

(b) Although the matter is not readily subject to empirical proof, commonsense suggests that mediation participants are more inclined to be candid, and thus more likely to reach a mediated settlement that benefits all of the participants and society as a whole, if they receive assurance that their mediation-related communications will be confidential and will not subsequently be used against them.

(c) There is a substantial probability that publicly disclosing mediation-related communications provided under an assurance of confidentiality, or disclosing such a communication to a mediation participant who was not privy to it during the mediation, will have a prejudicial impact on future use of mediation and attainment of its potential benefits.

(d) The public also has a strong interest in holding members of the State Bar accountable for misconduct, including any misconduct that occurs in the course of a mediation. If members of the State Bar are not held accountable for misconduct, that is likely to reduce public confidence in the judicial system and the fair administration of justice.

(e) In addition, the public has a right of access to information concerning the conduct of the people’s business, including a right of access to judicial records and proceedings. That right of access is not absolute, but it is of great importance and it is enshrined in the First and Fourteenth Amendments to the United States Constitution, and in Article I, Section 2, subdivision (a), and Article I, Section 3, subdivision (b), of the California Constitution.

(f) This Act seeks to comply with those constitutional constraints while balancing the competing policy interests in a

manner that will most effectively serve the citizens of this State. It shall be construed in accordance with that objective.

The language in subdivision (c) of this provision would closely track the language that the California Supreme Court used to describe the second prong of the multi-part constitutional test in *NBC Subsidiary*.²⁶⁸

A provision like the one shown above might facilitate judicial determinations regarding compliance with that constitutional requirement and the requirement of demonstrating the existence of an “overriding interest” for First Amendment purposes. Importantly, such a provision could also serve to satisfy California’s constitutional requirement that a statute limiting the right of access “*shall be adopted with findings demonstrating the interest protected by the limitation and the need for protecting that interest.*”²⁶⁹

Assuming that the Commission’s proposal would incorporate one or more limitations on public access to judicial records and/or proceedings, **would the Commission like to include a provision like this in its proposal? If so, does anyone have suggestions for improvement of the language shown above?**

The Remaining First Amendment Requirements: The Limitation on Public Access Must Be the Least Restrictive Means to Achieve the Overriding Interest and It Must Be Narrowly Tailored to Serve that Interest

There are two more First Amendment requirements for determining the validity of a limitation on public access to a judicial record or proceeding:

- (1) The limitation on public access must be “narrowly tailored to serve the overriding interest.”
- (2) The limitation on public access must be the “le[ast] restrictive means” to achieve the overriding interest.

These requirements are somewhat similar in nature; they focus on the *way* in which legislation limiting public access seeks to serve a competing policy interest. Whether these two requirements are satisfied will depend on the specific features of the provision in question that limits public access.

It is therefore necessary to consider specifically what types of judicial techniques limiting public access (sealing orders, protective orders, *in camera* hearings, or the like) would be needed, and specifically how they would be used, in a legal malpractice case that alleges mediation malpractice. As the staff

268. See 20 Cal. 4th at 1218 (there must be “a substantial probability that the [overriding] interest will be prejudiced absent closure and/or sealing).

269. Cal. Const. art. I, § 3(b)(2) (emphasis added).

previously noted, the best means of determining this may be “to visualize and talk through the entire process of ...[l]itigating a malpractice case that involves alleged mediation misconduct by an attorney”²⁷⁰

Thus, the remainder of this memorandum examines each phase of a legal malpractice case that alleges mediation misconduct:

- (1) The pleading phase.
- (2) Discovery and related motions.
- (3) Trial, summary judgment, or other adjudicatory proceedings.
- (4) Review by appeal or writ.

For each phase, we discuss whether there should be any restrictions on access to the judicial records and proceedings, and, if so, how to structure such restrictions consistent with the constitutional requirements.

Step-By-Step Analysis of a Legal Malpractice Case That Alleges Mediation Misconduct

In doing a step-by-step analysis of a legal malpractice case that alleges mediation misconduct, it is clearly necessary for the Commission to pay close attention to the constitutional requirements that any limitation on public access must be (1) “narrowly tailored to serve the overriding interest,” and (2) the “le[ast] restrictive means” to achieve the overriding interest. Together, these requirements seem to call for *carefully drawn, selective limitations on access*, not more broad brush restrictions.

It may also be helpful for the Commission to keep a number of other points in mind:

- In general, the First Amendment right of access does not apply to discovery materials or discovery motions.²⁷¹ But it does apply when discovery materials are introduced at trial or submitted in connection with a summary judgment motion or other substantive motion (at least so long as those discovery materials are admissible).²⁷² As the California Supreme Court put it, there is a First Amendment right of access to “civil litigation documents filed in court *as a basis for adjudication*.”²⁷³

In other words, the First Amendment right of access *seems to increase in strength as litigation progresses towards the decisionmaking*

270. Memorandum 2015-55, p. 31.

271. See discussions of “Limited Guidance From the United States Supreme Court” and “First Amendment Access to Judicial Records” *supra*.

272. See discussion of “First Amendment Access to Judicial Records” *supra*.

273. *NBC Subsidiary*, 20 Cal. 4th at 1208 n. 25 (emphasis added).

phase. Affording public access to judicial records and proceedings that *reveal the basis for the resolution of a case* appears to be particularly important.²⁷⁴ Affording public access to judicial records and proceedings that are *merely procedural in nature* appears to be less of a concern.²⁷⁵

- In safeguarding the First Amendment right of access, courts appear to be particularly concerned about situations in which public access to a case is completely barred or much restricted.²⁷⁶
- A limitation on access to a judicial record *can be temporary*. For instance, a court can rescind or modify a sealing order as a case progresses if that appears appropriate.²⁷⁷
- A mediation communication may not have been made in the presence of all of the mediation participants. Preventing disclosure of that communication to certain mediation participants might be as important, or even more important, to the source of the communication as preventing its disclosure to the public generally.

The Pleading Phase

Like other civil cases, a legal malpractice case alleging mediation misconduct would commence with the filing of a complaint. Under Code of Civil Procedure Section 425.10, a complaint must include a “statement of the facts constituting the cause of action, in ordinary and concise language,” as well as a “demand for judgment for the relief to which the pleader claims to be entitled.”

In general, a plaintiff in a legal malpractice case alleging mediation misconduct could not meet this pleading requirement without disclosing some confidential mediation communications. If the complaint became public, or was shared with persons not present during those mediation communications, the confidentiality of those communications would be destroyed, undermining the

274. See, e.g., *Cuadra*, 2012 U.S. Dist. LEXIS at *37 (noting that “the legal and factual bases embodied in this Opinion” largely protect “[t]he public’s interest — i.e., access to the Court’s reasoning on this matter”).

275. See discussion of “First Amendment Access to Judicial Records” *supra*.

276. See, e.g., *Press-Enterprise I*, 464 U.S. 501, 513 (noting that trial judge “closed an incredible six weeks of *voir dire* without considering alternatives to closure.”); *Company Doe*, 749 F.3d at 254-55, 59 (pointing out that First Amendment “does not provide for a right to petition the courts in secret,” yet “the entire litigation — which included Company Doe’s motion for a preliminary injunction, the Commission’s motion to dismiss, Company Doe’s motion to amend the complaint, the parties’ motions for summary judgment, and oral argument — occurred under seal.”); *Circuit Court v. Lee Newspapers*, 33s P.3d 523, 532 (Wyo. 2014) (explaining that circuit court’s concern “does not justify the wholesale closure of all court proceedings.”).

277. See, e.g., *Overstock.com*, 231 Cal. App. 4th at 483 (trial courts “holistic, evolving view of the propriety of sealing was well taken.”); *In re Marriage of Nicholas*, 186 Cal. App. 4th 1566, 1569, 113 Cal. Rptr. 3d 629 (“well-established constitutional, case, and statutory authority subject[s] sealing orders to continuing review and modification by the trial judge”).

goals of mediation confidentiality. As a federal district court explained when sealing alleged attorney-client communications in a complaint,

[t]he extremely important public and private purposes served by preserving the confidentiality of such communications *would be undermined if one party could unilaterally trumpet such information in a pleading available for public inspection*. At this stage of the proceedings, failure to maintain such information under seal will cause “a clearly defined and serious injury” not only to the parties seeking closure but also to the public interest which the attorney-client privilege is designed to serve.²⁷⁸

It is important to consider, then, whether to limit public access to a legal malpractice complaint that alleges mediation misconduct, and, if so, how to do so in a constitutional manner. To facilitate discussion of these matters, it may be helpful to consider a hypothetical complaint that begins with the following allegations:

1. Plaintiff James Doe is an individual residing in Los Angeles, California.
2. Defendant George Anderson is an individual residing and practicing law in Los Angeles, California. Defendant is, and at all times relevant hereto was, a member of the State Bar of California in good standing.
3. Plaintiff James Doe is the owner of 5,000 acres of farmland near Merced, California. He inherited that property in 1985, after his father died. A true and correct copy of the property description is attached hereto and incorporated herein by reference.
4. At or about the same time that plaintiff James Doe inherited the property described in paragraph 3, he hired William Smith to manage the property and all of the buildings, livestock, and agricultural operations on that property. William Smith served in that capacity continuously until plaintiff James Doe fired him on or about April 3, 2013.
5. On or about March 26, 2013, a fire occurred on the property described in paragraph 3. The fire destroyed several buildings on the property, an almond orchard, and a cherry orchard. All of the livestock on the property, including, but not limited to, a herd of approximately 35 cattle and eleven valuable racehorses, died in the fire.
6. Plaintiff James Doe is informed and believes, and thereupon alleges, that William Smith caused the fire described in paragraph 5 by dropping a lighted cigarette in the horse barn and failing to properly extinguish it.

278. *Dombrowski*, 128 F. Supp. 2d 216, 219 (E.D. Pa. 2000) (emphasis added).

7. At the time of the fire described in paragraph 5, there was no insurance on the property described in paragraph 3 or on any of the buildings, agricultural operations, or livestock on that property.

8. On or about June 1, 2013, plaintiff James Doe hired defendant George Anderson to represent him in connection with the events described in paragraphs 5 and 6.

9. On or about June 7, 2013, plaintiff James Doe brought a lawsuit against William Smith for damages resulting from the fire described in paragraph 5. A true and correct copy of the complaint in that lawsuit is attached hereto and incorporated herein by reference.

10. On or about February 15, 2014, the parties to the lawsuit described in paragraph 9 participated in a mediation before mediator Mary Jones. Defendant George Anderson represented plaintiff James Doe at the mediation. Mark Jacobson, who was a member of the State Bar of California in good standing at all times relevant hereto, represented William Smith.

11. The mediation described in paragraph 10 began at or about 8 a.m. There was a short lunch break and a brief mid-afternoon coffee break, but no other breaks.

12. At or about 8:45 p.m. on the day of the mediation, defendant George Anderson met privately with plaintiff James Doe. In that meeting, defendant George Anderson strongly urged plaintiff James Doe to accept a settlement offer from William Smith in the amount of \$1,100,000, plus title to a piece of farmland belonging to William Smith in Oregon. Defendant George Anderson explained that an asset search conducted at his request before the mediation had revealed that William Smith had no other reachable assets.

13. After interrupting to take what he said was an important call from his doctor about his vasectomy, defendant George Anderson further stated that the Oregon farmland belonging to William Smith was worth approximately \$700,000 based on a recent appraisal that William Smith showed him during the mediation. Defendant George Anderson then told plaintiff James Doe that it would be extremely foolish not to accept the settlement offer.

14. Plaintiff James Doe accepted the settlement offer in reliance on the advice from defendant George Anderson described in paragraphs 12 and 13. A true and correct copy of the settlement agreement that the parties reached during the mediation and memorialized shortly thereafter is attached hereto and incorporated herein by reference.

16. On or about April 10, 2015, plaintiff James Doe learned that the Oregon farmland he acquired under the settlement agreement described in paragraph 14 was subject to an easement in favor of a neighboring landowner, reducing its value by approximately \$100,000. At no time before, during, or after the mediation described in paragraph 10 did defendant George Anderson tell plaintiff James Doe about this easement. Plaintiff is informed and believes, and based thereon alleges, that defendant George

Anderson knew, or should have known, about the easement because it was described in the appraisal that William Smith showed to the defendant at the mediation.

14. On or about April 19, 2015, plaintiff James Doe learned that defendant George Anderson was mistaken when he said during the mediation that William Smith had no reachable assets other than the ones included in the settlement agreement described in paragraph 13.

The complaint goes on to allege that the defendant breached his duty to exercise reasonable care in representing the plaintiff, which proximately caused foreseeable harm to the plaintiff because the plaintiff could have received a better settlement if the plaintiff had not relied on the defendant's misstatement and material omission.

Some parts of the above-described complaint describe alleged mediation communications, or disclose information from which it might be possible to deduce the content of alleged mediation communications. But much of the hypothetical complaint consists of innocuous, non-confidential material, such as the allegations about the parties' occupations and places of residence.

Thus, if a court were to seal the entire complaint, the public would not only be denied access to the alleged mediation communications, but would also be deprived of additional information regarding the legal malpractice case. For instance, the public would not be able to determine that the complaint involved a dispute between a Los Angeles resident and a Merced resident, which could be important in assessing whether a particular judge was biased against citizens from one of those areas. Similarly, the public would not be able to determine that the legal malpractice complaint involved a female mediator and a male defendant, which could be of interest in identifying the types of situations in which allegations of mediation misconduct are most likely to arise.

It therefore seems unlikely that a court order sealing the *entire* complaint would satisfy the First Amendment requirements of being (1) "narrowly tailored" to serve an overriding interest, and (2) the "least restrictive means" of achieving such an interest. Similarly, if a statute automatically required *complete* sealing of a legal malpractice complaint that alleges mediation misconduct, the statute *probably would be unconstitutional*.

Would it be possible to constitutionally protect any of the alleged mediation communications in the hypothetical complaint from public disclosure? Would it be possible to draft a statute that would provide such protection in a

constitutional manner with regard to the pleading process for a legal malpractice case that alleges mediation misconduct?

Because the law relating to the First Amendment right of access is still unclear in some respects, it is impossible to predict with any certainty how it would apply to the context at hand. Most likely, however, *a particularized approach, which only shields carefully selected material from public view*, could survive First Amendment scrutiny if it was well-drafted.

(1) Key Criterion for Limiting Disclosure of Alleged Mediation Communications in the Pleadings in a Legal Malpractice Case Based on Mediation Misconduct

To craft such an approach, the Commission would have to decide, among other things, how much mediation-related information (if any) a court could shield from public view — i.e., the key criterion for restricting disclosure of alleged mediation communications in the pleadings in a legal malpractice case based on mediation misconduct. Focusing on our hypothetical complaint, there are a number of different options.

We describe six possible approaches below (Approaches #1-#6). We will be referring to these possibilities not only in this discussion of the pleading phase of a legal malpractice case based on mediation misconduct, but also in the discussions of later phases of such a case. To make it easy for readers to keep track of these approaches, we have attached a one-page summary of them at the end of this memorandum (Exhibit p. 20), which readers can detach and keep at hand for ready reference if desired. **This list of possibilities is *not exhaustive*; we encourage creative thinking about other possibilities.**

The first possibility would be for a court to **redact all of the allegations that (1) disclose alleged mediation communications or (2) disclose information from which people could determine the likely content of alleged mediation communications (Approach #1)**. More specifically, under this approach, a court might redact the allegations shown in ~~strikeout~~ below:

12. At or about 8:45 p.m. on the day of the mediation, defendant George Anderson met privately with plaintiff James Doe. ~~In that meeting, defendant George Anderson strongly urged plaintiff James Doe to accept a settlement offer from William Smith in the amount of \$1,100,000, plus title to a piece of farmland belonging to William Smith in Oregon. Defendant George Anderson explained that an asset search conducted at his request before the mediation had revealed that William Smith had no other reachable assets.~~

13. ~~After interrupting to take what he said was an important call from his doctor about his vasectomy, defendant George Anderson~~

~~further stated that the Oregon farmland belonging to William Smith was worth approximately \$700,000 based on a recent appraisal that William Smith showed him during the mediation. Defendant George Anderson then told plaintiff James Doe that it would be extremely foolish not to accept the settlement offer.~~

~~14. Plaintiff James Doe accepted the settlement offer in reliance on the advice from defendant George Anderson described in paragraphs 12 and 13. A true and correct copy of the settlement agreement that the parties reached during the mediation and memorialized shortly thereafter is attached hereto and incorporated herein by reference.~~

~~16. On or about April 10, 2015, plaintiff James Doe learned that the Oregon farmland he acquired under the settlement agreement described in paragraph 14 was subject to an easement in favor of a neighboring landowner, reducing its value by approximately \$100,000. At no time before, during, or after the mediation described in paragraph 10 did defendant George Anderson tell plaintiff James Doe about this easement. Plaintiff is informed and believes, and based thereon alleges, that defendant George Anderson knew, or should have known, about the easement because it was described in the appraisal that William Smith showed to the defendant at the mediation.~~

~~14. On or about April 19, 2015, plaintiff James Doe learned that defendant George Anderson was mistaken when he said during the mediation that William Smith had no reachable assets other than the ones included in the settlement agreement described in paragraph 13.~~

Under this approach, it would be difficult for the public to determine the core nature of the dispute. The redacted allegations constitute the heart of the case. Consequently, this redaction approach may raise constitutional concerns.

The staff suspects that such redaction of the complaint might have a chance of passing constitutional muster at an *early* stage of the case, when the court has not yet adjudicated anything. But once the court begins to resolve substantive issues, such as when it considers a summary judgment motion or commences a trial, the First Amendment right of access may well require disclosure of at least some of the redacted information.²⁷⁹

Thus, **another option (Approach #2) would be to temporarily redact the information shown above.** In other words, the court could restrict public

279. See generally *Mercury Interactive*, 158 Cal. App. 4th at 103 (“[T]he importance of a complaint in framing the claims and issues in civil litigation cannot be downplayed”); but see *id.* (Discovery material attached to complaint is not necessarily submitted as basis for adjudication triggering right of access; “pleadings, including complaints, are not typically evidentiary matters that are submitted to a jury in adjudicating a controversy.”).

disclosure of that information (e.g., by sealing the full complaint and publicly filing only a redacted version) during the initial stages of the case, but would have to revisit the extent of that sealing, and perhaps disclose more information, upon reaching an adjudicatory stage.

Yet another possibility (Approach #3) would be to redact only alleged mediation communications *that are irrelevant to the legal malpractice claim.* Alleged mediation communications that are relevant to that claim would become public. In our hypothetical complaint, for example, one could argue that George Anderson's alleged comment about his vasectomy appears to be irrelevant to the case at hand and should be redacted even if the other alleged mediation communications are disclosed:

13. ~~After interrupting to take what he said was an important call from his doctor about his vasectomy,~~ defendant George Anderson further stated that the Oregon farmland belonging to William Smith was worth approximately \$700,000 based on a recent appraisal that William Smith showed him during the mediation. Defendant George Anderson then told plaintiff James Doe that it would be extremely foolish not to accept the settlement offer.

The vasectomy comment might also be subject to a motion to strike, but striking the comment would not serve the same function as redaction — i.e., keeping the comment confidential.

One could also argue, however, that the vasectomy comment is not irrelevant: The plaintiff could use it to help show that the defendant attorney was distracted by medical concerns and not properly concentrating during the mediation. Alternatively, the plaintiff could use the alleged comment to help show that he was subjected to a lot of strain before he agreed to settle late in the day.

If a court considers the vasectomy comment relevant, then the comment would not be redactable under the relevancy standard in Approach #3. But suppose the court concludes (based on the face of the complaint) that the alleged comment is inadmissible on grounds other than relevancy (e.g., the court considers the alleged comment more prejudicial than probative under Evidence Code Section 352). Suppose further that the standard for redaction focuses on *admissibility* rather than relevance — i.e., **a court could redact only alleged mediation communications *that would be inadmissible at trial* (Approach #4).** Under that standard, the vasectomy comment would be redactable despite its relevance to the legal malpractice claim, because it is inadmissible.

Now suppose instead that the court (1) considers the vasectomy comment sufficiently probative to admit, and (2) concludes that the defendant attorney waived the doctor-patient privilege by disclosing medical information to the plaintiff.²⁸⁰ Under these circumstances, the alleged comment does not appear to be inadmissible (at least from the face of the complaint) and thus it would not be redactable under the admissibility standard in Approach #4. But the alleged comment is not a critical piece of evidence and its disclosure could be embarrassing to the defendant attorney.

In light of those considerations, perhaps the hypothetical court *should have discretion* to redact the vasectomy comment from the publicly available version of the complaint, *even though* the comment may be admissible. For example, **a statute could direct the court to consider all of the facts and circumstances and permit it to redact alleged mediation communications as appears appropriate within constitutional bounds (Approach #5).**

There is of course another possibility: **A statute could direct the court to redact mediation communications to the greatest extent constitutionally permissible (Approach #6).** This would be similar to Approach #1 (redacting all allegations that disclose alleged mediation communications or information from which people could determine the likely content of alleged mediation communications). But the extent of redaction would be expressly subject to the constitutional limitations. Precisely what that would mean in practice is not clear at present, but it might become more certain as case law develops.

Commissioners and others following this study may be able to think of additional approaches, with different effects. Among other things, **it is important to consider whether the redaction requirements should focus solely on protecting mediation communications from public disclosure**, or also protect a mediation communication from disclosure to a mediation participant who was not privy to it during the mediation.

The situation is thus complex and it is challenging to choose the key criterion (if any) for redaction or sealing of alleged mediation communications in a legal malpractice case based on mediation misconduct. The more information is kept

280. The defendant attorney may argue that there was no waiver, because “[a] disclosure that is itself privileged is not a waiver of any privilege.” Evid. Code § 912(c). But the hypothetical court considers that rule was inapposite: In the court’s view, the mediation confidentiality statute does not protect the vasectomy comment because the comment falls within the mediation confidentiality exception for attorney misconduct, which was newly enacted on Commission recommendation.

from the public eye, the greater the risk that the approach is constitutionally flawed. But the more mediation communications are exposed beyond their intended recipients, the greater the impingement on the interests served by mediation confidentiality. **The Commission needs to determine its priorities and objectives and how much risk it wants to take.**

Those hard policy choices are for the Commission (and ultimately the Legislature and the Governor, as the elected representatives of the public) to make. The staff refrains from making a recommendation, but we need guidance on how to proceed.

Whatever criterion (or set of criteria) the Commission selects for redacting, sealing, or otherwise limiting disclosure of mediation information in the pleadings in a legal malpractice case based on mediation misconduct, **the Commission's proposed legislation should expressly require the limitation on disclosure to be narrowly restricted to that type of material.** Such a requirement would help to ensure that the legislation passes constitutional muster.

Depending on which approach the Commission selects, other statutory requirements may also be necessary or at least desirable. We discuss some procedural specifics and related matters below.

(2) Procedural Specifics and Related Matters

In *NBC Subsidiary*, the California Supreme Court mentioned several procedural requirements that apply before “*substantive courtroom proceedings* are closed or *transcripts* are ordered sealed”²⁸¹ The Court did not specify the extent to which those procedural requirements apply in other circumstances, such as sealing of a judicial record other than a transcript (e.g., a complaint or other pleading). For the most part, however, these requirements stem from comments of the United States Supreme Court construing the First Amendment right of access in various contexts. The procedural requirements that the California Supreme Court specified in *NBC Subsidiary* were:

- (1) **Notice.** In general, a trial court must provide notice *to the public* of a contemplated closure of a substantive courtroom proceeding or sealing of a transcript.²⁸² “[W]hen a motion to close a proceeding is

281. 20 Cal. 4th at 1217 (emphasis added).

282. See 20 Cal. 4th at 1217; see also *id.* at 1226 (“The decisions of the United States Supreme Court and numerous lower courts establish that notice is required in order for substantive trial or chambers proceedings to be closed in a manner comporting with the Constitution but ... no special ‘notice to the press’ generally is required.”). There appears to be a certain amount of flexibility about the timing of this constitutionally required notice. See discussion of “Guidance

made in open court (or, for example, at a closed bench conference held during open court proceedings), adequate notice of the contemplated closure is provided if the trial judge thereafter announces in open court that he or she plans to hold (or to consider holding) that proceeding in closed session. When a motion seeking closure is made in a written filing, adequate notice is provided by publicly docketing the motion reasonably in advance of a determination thereon.”²⁸³

Although these means of notice *to the public* may be sufficient for constitutional purposes, other means of notice might also be desirable in a particular situation. For instance, some form of notice *to mediation participants* might be appropriate in the context at hand.

- (2) **Opportunity to be heard.** In general, “*before* courtroom proceedings are closed or transcripts are ordered sealed a trial court must hold a hearing” on whether the situation satisfies the requirements of the multi-part test for determining the validity of a limitation on public access.²⁸⁴ The sealed record rules address this timing requirement through the concept of “lodging” a document with the court, rather than “filing” the document. After a litigant lodges a document and requests that it be sealed, the court conducts a hearing on whether to grant that request. If the court decides to seal the document, then the court officially files the document and the document becomes a judicial record. If the court decides not to seal the document, then the court returns it to the litigant. It does not become a judicial record and thus is not subject to the First Amendment right of access.²⁸⁵
- (3) **Findings.** In general, “*before* courtroom proceedings are closed or transcripts are ordered sealed a trial court must ... expressly find that (i) there exists an overriding interest supporting closure and/or sealing; (ii) there is a substantial probability that the interest will be prejudiced absent closure and/or sealing; (iii) the proposed closure and/or sealing is narrowly tailored to serve the overriding interest; and (iv) there is no less restrictive means of achieving the overriding interest.”²⁸⁶ These findings must be

From the California Supreme Court in *NBC Subsidiary: An Ordinary Civil Proceeding is ‘Presumptively Open’*” *supra*.

283. *Id.*

284. *Id.* at 1217-18 (emphasis in original); see also *Globe*, 457 U.S. at 609 n.15 (for case-by-case approach to court closure to be meaningful, press and public must be given opportunity to be heard on question of their exclusion). There appears to be a certain amount of flexibility about the timing of this constitutionally required hearing. See discussion of “Guidance From the California Supreme Court in *NBC Subsidiary: An Ordinary Civil Proceeding is ‘Presumptively Open’*” *supra*.

285. See Cal. R. Ct. 2.550-2.551, 8.45-8.47; see also discussions of “California Rules of Court 2.550 and 2.551: Sealing a Record in a Trial Court” and “California Rules of Court 8.45, 8.46, and 8.47: Sealing a Record in a Reviewing Court” *supra*.

286. *Id.* at 1217-18 (emphasis in original; footnotes omitted). There appears to be a certain amount of flexibility about the timing of these constitutionally required findings. See discussion

“specific enough that a reviewing court can determine whether the closure order was properly entered.”²⁸⁷

The extent to which the Commission’s proposed legislation would have to incorporate these procedural requirements may vary depending on how much mediation information it seeks to shelter from disclosure. For example, suppose the Commission selects Approach #3, which would only entail redaction of mediation communications that are *irrelevant* to the legal malpractice claim. As previously discussed,²⁸⁸ the presumptive First Amendment right of access, and thus the multi-part test for justifying a restriction on access, does not appear to apply to irrelevant materials (although the United States Supreme Court and the California Supreme Court have not yet addressed this point).²⁸⁹ Thus, **under Approach #3, it may be possible to redact or seal the material in question simply by meeting a good cause standard**,²⁹⁰ which might require no more than showing that the material consists of irrelevant mediation communications.

The same might be true under Approach #4, which would require redaction of an alleged mediation communication in a pleading in a legal malpractice case based on mediation misconduct if that communication would be *inadmissible* at trial. Some courts have said that the presumptive First Amendment right of access is inapplicable to inadmissible evidence.²⁹¹ As other cases indicate, however, that is less clear than with regard to irrelevant evidence.

In *NBC Subsidiary*, for example, the press challenged a blanket closure of “all courtroom proceedings held outside the presence of the jury”²⁹² The First Amendment challenge was successful, despite a claim that access to those proceedings might “increase ‘the risk that jurors will be exposed to the very

of “Guidance From the California Supreme Court in *NBC Subsidiary*: An Ordinary Civil Proceeding is ‘Presumptively Open’ *supra*.”

287. *Press-Enterprise I*, 446 U.S. at 510; *Press-Enterprise II*, 478 U.S. at 9-10, 13-14; see also Cal. R. Ct. 2.550(e)(1)(A).

288. See discussion of “First Amendment Access to Judicial Records” *supra*.

289. See, e.g., *Overstock.com*, 231 Cal. App. 4th at 492; see also *id.* at 497 & cases cited therein.

290. See, e.g., *Overstock.com*, 231 Cal. App. 4th at 511.

291. See, e.g., *Apple, Inc. v. Samsung Electronics Co., Ltd.*, 727 F.3d 1214, 1222-23 (Fed. Cir. 2013) (“[E]vidence which a trial court rules inadmissible — either as irrelevant or inappropriate — seems particularly unnecessary to the public’s understanding of the court’s judgment.”); *Overstock.com*, 231 Cal. App. 4th at 492 (“[M]aterials as to which evidentiary objections are sustained are not ‘submitted as a basis for adjudication’ and thus are not within the ambit of the constitutional right of access”); *E.E.O.C. v. Dial Corp.*, 2000 U.S. Dist. LEXIS 22149, *3 (N.D. Ill. 2000) (“The public has no interest in gaining access to information that has failed to pass the threshold tests of relevance and admissibility.”).

292. 20 Cal. 4th at 1181.

information that was held from them”²⁹³ This suggests that the presumptive First Amendment right of access may apply to a proceeding involving inadmissible evidence and thus closure of such a proceeding, or sealing of the transcript, might have to satisfy *NBC Subsidiary*’s procedural requirements and the multi-part test for determining whether a limitation on a First Amendment right of access is valid.

That is precisely the approach that the trial court took in *Jackson*, making the findings required by the multi-part test to support a sealing order that would, among other things, “prevent exposure to inadmissible items of evidence.”²⁹⁴ The Second District Court of Appeal largely upheld that sealing order, engaging in similar constitutional analysis.²⁹⁵

One might ask, however, whether it would at least be permissible for a trial court to seal or otherwise preclude public access to *confidential*, potentially inadmissible material in a complaint or other pleading without having to meet *NBC Subsidiary*’s procedural requirements and the multi-part constitutional test. The sealed record rules for trial courts, for example, are expressly inapplicable to “records that are required to be kept confidential by law.”²⁹⁶ As best the staff can discern, the legislative designation of “confidential” seems to excuse the need to comply with at least some of *NBC Subsidiary*’s requirements (though it is not clear to the staff why a statute making a record “confidential” should receive greater deference than a statute closing a court proceeding, particularly if the record is a transcript of a court proceeding).

It is possible, then, that under Approach #4 a court in a legal malpractice case based on mediation misconduct would be able to redact or seal an apparently inadmissible mediation communication in a pleading without jumping through all of the procedural and substantive hoops specified in *NBC Subsidiary*. That is not certain, however, and some cases seem to suggest that even the sealing of inadmissible material that is confidential by law (e.g., a confidential attorney-client communication) must comply with the constitutional rubric.²⁹⁷ **It would be constitutionally safer (albeit more burdensome on courts, litigants, and**

293. *Id.* at 1221.

294. 128 Cal. App. 4th at 1017.

295. See *id.* at 1021-29.

296. Cal. R. Ct. 2.550(a)(2). In contrast, California Rule of Court 8.47 addresses the treatment of confidential records in a reviewing court.

297. See the descriptions of *Lugosch* and *Green Mountain* in the discussion of “Contexts in Which Courts Have Denied First Amendment Access to a Judicial Proceeding or a Judicial Record” *supra*. See also notes 150 & 154 *supra*.

mediation participants) to require satisfaction of those requirements under Approach #4.

The remaining approaches described above (Approach #1, Approach #2, Approach #5, and Approach #6) would all require or permit a court to restrict disclosure of alleged mediation communications that might eventually become relevant, admissible evidence in a legal malpractice case based on mediation misconduct. Unless the complaint or other pleading in question is verified, those mediation communications would only be in the form of allegations at this stage; they would not constitute evidence. Nonetheless, public disclosure of them might be harmful, and restricting such disclosure might help protect the interests underlying mediation confidentiality.

Because the mediation communications are not yet in evidentiary form, it might be possible to restrict their disclosure without complying with the procedural requirements of *NBC Subsidiary* described above. At this stage of the case, those communications arguably are not being “used at trial nor submitted as a basis for adjudication,”²⁹⁸ so the presumptive First Amendment right of access might not yet attach.²⁹⁹

The staff is far from certain of this, however, and here again **it would be safer to incorporate *NBC Subsidiary*’s procedural requirements into the Commission’s proposal if it decides to follow Approach #1, Approach #2, Approach #5, or Approach #6.** In particular, the Commission might **consider following an approach similar to the sealed records rules** (Cal. R. Ct. 2.550-2.551, 8.45-8.47). The Commission could do that by cross-referring to those rules where appropriate, drafting a similar statutory scheme, or both. The staff encourages the Commission to **take a close look at the sealed records rules (Exhibit pp. 1-19) and assess the possibility of using such techniques in its proposal.**

To give a concrete flavor to this possibility, the staff experimented with how such an approach might look. Suppose, for example, the Commission decides to follow Approach #5. That approach would permit, but not require, a court in a legal malpractice case based on mediation misconduct to redact or otherwise restrict access to an alleged mediation communication in a pleading as long as the restriction is constitutional.

298. *NBC Subsidiary*, 20 Cal. 4th at 1208 n.25.

299. But see *Jackson*, 128 Cal. App. 4th 1009 (applying *NBC Subsidiary* requirements to sealing of indictment and holding such sealing improper).

Focusing solely on the filing of the complaint, the staff offers the following possible implementation of Approach #5, with the firm caveat that *this is just a rough preliminary draft for discussion purposes and not a staff recommendation*:

Evid. Code § 1131 (added). Commencement of action for legal malpractice in mediation process

1131. (a) To commence an action against an attorney for malpractice in the mediation process, a former client shall simultaneously do all of the following in the same court:

(1) Lodge a complaint that complies with Section 425.10 of the Code of Civil Procedure but minimizes disclosure of alleged mediation communications.

(2) Lodge a memorandum of points and authorities that does all of the following:

(A) Lists each alleged mediation communication in the lodged complaint and each allegation from which the content of an alleged mediation communication can be inferred.

(B) Specifies which, if any, of the listed communications and allegations the plaintiff proposes to redact in the publicly filed version of the complaint.

(C) Explains the reason for any proposed redaction.

(3) File a mediation malpractice cover sheet on a form prepared by the Judicial Council. This form shall include all of the following:

(A) A caption that complies with Section 422.30 of the Code of Civil Procedure.

(B) The name and current mailing address of each mediation participant, if reasonably available.

(C) A request that the court schedule a hearing on filing of the complaint.

(4) Pay the filing fee specified in Section 70611.5 or 70613.5 of the Government Code.

(b) Compliance with the requirements of subdivision (a) shall stop the running of the limitations period specified in Section 340.6 of the Code of Civil Procedure.

(c)(1) After satisfying the requirements of subdivision (a), the plaintiff shall serve a summons, the lodged complaint, the memorandum of points and authorities, and the mediation malpractice cover sheet on each defendant in accordance with Chapter 4 (commencing with Section 413.10) of the Code of Civil Procedure.

(2) At the same time, the plaintiff shall mail the lodged complaint, the memorandum of points and authorities, and the mediation malpractice cover sheet to each mediation participant listed in the mediation malpractice cover sheet.

(d) When service on all of the defendants and mediation participants pursuant to subdivision (c) is complete, the plaintiff shall notify the court and file the proofs of service.

(e) For purposes of this section and Section 1132, “alleged mediation communication” means an oral or written communication that was allegedly made for the purpose of, in the course of, or pursuant to, a mediation or a mediation consultation.

Evid. Code § 1132 (added). Notice and *in camera* hearing on filing of complaint

1132. (a) Promptly upon receiving a hearing request under Section 1131 and notice that service on all defendants is complete, the court shall schedule an *in camera* hearing on how much, if any, of the lodged, unredacted complaint to file under seal. The court shall notify the plaintiff of the hearing date, time, and location, and include that information in its public docket. The court shall either mail, or direct the plaintiff to mail, the same information to each defendant and each mediation participant whose mailing address is listed in the mediation malpractice cover sheet.

(b)(1) No later than __ days after the court or plaintiff mails the notice of the *in camera* hearing, each defendant, each mediation participant, and any other interested person may lodge a memorandum of points and authorities that does one or more of the following:

(A) Identifies any errors or omissions in the list that the plaintiff prepared pursuant to subparagraph (A) of paragraph (2) of subdivision (a) of Section 1131.

(B) Specifies which, if any of the listed communications and allegations the defendant, mediation participant, or other interested person proposes to redact in the publicly filed version of the complaint.

(C) Explains the reason for any proposed redaction.

(2) If a person lodges a memorandum of points and authorities pursuant to this subdivision, the person shall simultaneously serve it on the parties and mediation participants listed in the mediation malpractice cover sheet.

(c) At the *in camera* hearing, the court shall consider the complaint lodged pursuant to Section 1131, the accompanying memorandum of points and authorities, and any memorandum of points and authorities lodged pursuant to this section.

(d) The court shall determine which, if any, of the alleged mediation communications or other allegations in the lodged complaint to redact. The court shall approve a redaction only if it expressly finds facts that establish:

(1) The redaction is narrowly tailored to prevent the disclosure of an alleged mediation communication, and thereby further the purposes of mediation confidentiality as specified in Section 1130, without unnecessarily restricting access to other information.

(2) No less restrictive means exist to achieve that interest.

(3) Preventing the disclosure of the alleged mediation communication, and thereby furthering the purposes of mediation confidentiality as specified in Section 1130, is an overriding interest

that overcomes the right of public access to the record and supports sealing the record.

(4) A substantial probability exists that the overriding interest will be prejudiced if the record is not sealed.

(e) If the court does not approve any redactions, it shall publicly file the complaint and the memoranda of points and authorities. The time for responding to the complaint shall begin to run when the complaint is filed.

(f)(1) If the court approves one or more redactions, it shall direct the plaintiff to prepare a redacted version of the complaint. Upon submission of the redacted version, the court shall publicly file that version of the complaint, without any additional fee, and simultaneously file, without any additional fee, the previously lodged, unredacted version of the complaint under seal. The time for responding to the complaint shall begin to run when that occurs.

(2) If the court approves one or more redactions of the complaint, it shall also determine whether each memorandum of points and authorities requires corresponding redaction. If no corresponding redaction is necessary, the court shall publicly file the memorandum. If a corresponding redaction is necessary, the court shall order the person submitting the memorandum to prepare a redacted version. The court shall publicly file the redacted version of the memorandum and file the previously lodged, unredacted version of the memorandum under seal. The court shall follow a similar procedure with regard to the transcript of the *in camera* hearing and any written order it enters in connection with that hearing.

Gov't Code § 70611.5 (added). Filing fee for first paper in unlimited civil case against attorney for mediation malpractice

70611.5. Notwithstanding Section 70611, the uniform fee for filing the first paper in an unlimited civil case against an attorney for malpractice in the mediation process is ____ dollars (\$__). This fee shall be distributed as provided in Section 68085.3.

Gov't Code § 70613.5 (added). Filing fee for first paper in limited civil case against attorney for mediation malpractice

70613.5. Notwithstanding Section 70613, the uniform fee for filing the first paper in a limited civil case against an attorney for malpractice in the mediation process is ____ dollars (\$__). This fee shall be distributed as provided in Section 68085.4.

Staff Note. We included the filing fee provisions shown above (proposed Gov't Code §§ 70611.5, 70613.5) because this type of approach to a legal malpractice case based on mediation misconduct would require more judicial attention than a typical civil case. It might therefore be appropriate to charge a different filing fee.

If this type of approach appeals to the Commission, the staff could flesh it out further to cover the remainder of the pleading process. We do not want to invest that effort without first receiving guidance from the Commission.

Discovery, Discovery Motions, and Other Procedural Motions

As previously discussed, the First Amendment right of access does not extend to the discovery process or a discovery motion.³⁰⁰ “[C]ivil discovery is not a public component of a trial.”³⁰¹ Similarly, this constitutional guarantee appears to be generally inapplicable to purely procedural issues; the main focus is to ensure public access to “the basis for adjudication”³⁰² — i.e., the trial, summary judgment hearing, or other substantive proceedings, and the “court records that are the foundation of and form the adjudicatory basis for those proceedings.”³⁰³

Consequently, **the Commission probably does not have to take any constitutional constraints into account** in determining whether, and, if so, how, to restrict public access to mediation evidence in the discovery phase and other purely procedural stages of a legal malpractice case that alleges mediation misconduct. **It can simply decide the appropriate level of protection to provide to mediation evidence in those stages** (such as Approach #1, Approach #2, Approach #3, Approach #4, Approach #5, or Approach #6), based on its assessment of the importance of the policy interests underlying mediation confidentiality. The staff will then begin to draft legislation accordingly.

For example, suppose the Commission selects Approach #1, which would restrict public access to any mediation communication or information from which people could determine the likely content of an alleged mediation communication. In that case, it might be sufficient to propose a provision along the following lines:

Evid. Code § 11xx (added). Limits on public access to mediation communications during discovery and procedural motions

11xx. In an action against an attorney for malpractice in the mediation process, the court shall use procedural techniques including, but not limited to, a protective order, a sealing order, a redaction order, an *in camera* hearing, or a closure order, to prevent public disclosure of any mediation communication, or any information from which the content of an alleged mediation

300. See discussions of “Limited Guidance From the United States Supreme Court” and “First Amendment Access to Judicial Records” *supra*.

301. *Oiye*, 211 Cal. App. 4th at 1069.

302. *Joy*, 692 F.2d at 893.

303. *Marriage of Burkle*, 135 Cal. App. 4th at 1052.

communication can be inferred, in the course of discovery or resolution of a discovery motion or other procedural motion.

There is, however, another important point that the Commission should consider with regard to the discovery phase of a legal malpractice case based on mediation misconduct. Under Code of Civil Procedure Section 2017.010, unless otherwise limited by a court order in accordance with the Civil Discovery Act, “any party may obtain discovery regarding any matter, not privileged, that is relevant to the subject matter involved in the pending action or to the determination of any motion made in that action, if the matter either is itself admissible in evidence or appears reasonably calculated to lead to the discovery of admissible evidence.” In a legal malpractice case based on mediation misconduct, **should the broad standard of Section 2017.010 apply with regard to discovery of mediation communications?** Should the scope of such discovery instead be more limited, to help protect the values underlying mediation confidentiality?

For example, mediator Lee Blackman’s proposal on *in camera* screening would include the following provisions:

(b) No order allowing or compelling discovery or disclosure of mediation communications or conduct may be entered before the court, arbitrator, or administrative agency finds, after a hearing in camera, that the party seeking discovery or the proponent of the evidence has shown by *clear and convincing evidence* (1) that the proponent has a *substantial likelihood of prevailing* on the claim that is the basis of the proceeding, (2) that the evidence is *not otherwise available*, and (3) that *there is a need for the evidence that substantially outweighs the interest in protecting confidentiality*.

(c) If the court, arbitrator, or other authority determines that the required showing has been made under subsection (b), the proponent of disclosure may seek *only relevant and admissible evidence that has a substantial tendency to prove or disprove one or more elements of the claim or cause of action at issue*. Mediation communications and conduct that are not relevant and admissible may not be sought or compelled. Mediation communications and conduct disclosed in discovery shall be protected from third party disclosure as provided in subsection (e).³⁰⁴

Under Mr. Blackman’s proposed subdivision (b), a party to a legal malpractice case based on mediation misconduct could only obtain discovery of

304. Memorandum 2015-55, Exhibit p. 5 (emphasis added).

mediation communications if the party shows three things at an *in camera* hearing:

- The evidence is “not otherwise available.”
- There is “a need for the evidence that substantially outweighs the interest in protecting confidentiality.”
- The party “has a substantial likelihood of prevailing on the claim that is the basis of the proceeding.”

The party seeking such discovery would have to satisfy all of these requirements by “clear and convincing evidence.” The staff suspects that would be difficult to do, particularly with regard to the third requirement at an early stage of the case.

Subdivision (c) of Mr. Blackman’s proposal would impose a further limitation on discovery in a legal malpractice case based on mediation misconduct. If the three requirements of subdivision (b) are met, “the proponent of disclosure may seek *only* relevant and admissible evidence that has a substantial tendency to prove or disprove one or more elements of the claim or cause of action at issue.”³⁰⁵ Mr. Blackman says the purpose of that restriction is “to limit discovery to evidence that is both relevant and admissible in order to avoid overbroad inquiries into presumptively sensitive and confidential communications.”³⁰⁶

The Commission should **consider Mr. Blackman’s proposed discovery requirements and decide whether to incorporate any or all of them into its own proposal.** The Commission should also **consider whether to propose any other deviation from the usual standard governing the scope of discovery.**

Approaches used in other legal contexts might provide possible models. With regard to the attorney-client privilege, for example, a federal district court gave the following guidance:

In conflicts between a client and former attorney, an attorney may disclose privileged information, but such disclosure must be *strictly limited* to information “*necessary* to defend against pending civil or criminal charges” and “should ordinarily be permitted in the course of formal proceedings and *under court supervision*.”³⁰⁷

The Commission might consider adapting this type of approach to the mediation confidentiality context.

Comments and suggestions on these points would be helpful.

305. Emphasis added.

306. Memorandum 2015-55, Exhibit p. 5 n.9.

307. *Diversified Group*, 217 F.R.D. at 161 n.7, *quoting* First Federal Savings & Loan Ass’n v. Oppenheimer, Appel, Dizon & Co., 110 F.R.D. 557, 566 (S.D.N.Y. 1996).

Trial, Summary Judgment, or Other Adjudicatory Proceedings

The First Amendment right of access most clearly applies to the trial or other adjudicatory proceedings in a case, and any materials that are “used at trial” or “submitted as a basis for adjudication.”³⁰⁸ Once a legal malpractice case based on mediation misconduct reaches this stage, it seems likely that courts will say there is a presumption of public access to the proceedings and related materials.

That presumption is not conclusive, because “[t]he First Amendment right of access is not absolute.”³⁰⁹ But it can only be overcome through a showing, supported by specific findings entered after notice and a hearing, that “(i) there exists an overriding interest supporting closure and/or sealing; (ii) there is a substantial probability that the interest will be prejudiced absent closure and/or sealing; (iii) the proposed closure and/or sealing is narrowly tailored to serve the overriding interest; and (iv) there is no less restrictive means of achieving the overriding interest.”³¹⁰

As previously discussed, that standard is not impossible to meet.³¹¹ To give just one example, *Poughkeepsie Newspapers v. Rosenblatt*³¹² involved a court order that “did not exclude the public from the trial itself, but only from a brief hearing to determine the admissibility of certain evidence.”³¹³ The press challenged the

308. See, e.g., *Overstock.com*, 231 Cal. App. 4th at 252; see discussion of “First Amendment Access to Judicial Records” *supra*.

309. *Circuit v. Lee Newspapers*, 2014 Wy. 101, 332 P.3d 523 (Wyo. 2014); see *Globe*, 457 U.S. at 606.

310. *NBC Subsidiary*, 20 Cal. 4th at 1217-18 (footnotes omitted).

311. See discussion of “Contexts in Which Courts Have Denied First Amendment Access to a Judicial Proceeding or a Judicial Record” *supra*.

312. 92 A.D.2d 232, 459 N.Y.S.2d 857 (N.Y. App. Div. 1983), *aff’d on same grounds*, 61 N.Y.2d 1005, 463 N.E.2d 1222, 475 N.Y.S.2d 370 (N.Y. 1984).

313. *Id.* at 234. For a California statute that calls for an *in camera* hearing to determine admissibility, see Evidence Code Section 915, which provides:

915. (a) Subject to subdivision (b), the presiding officer may not require disclosure of information claimed to be privileged under this division or attorney work product under subdivision (a) of Section 2018.030 of the Code of Civil Procedure in order to rule on the claim of privilege; provided, however, that in any hearing conducted pursuant to subdivision (c) of Section 1524 of the Penal Code in which a claim of privilege is made and the court determines that there is no other feasible means to rule on the validity of the claim other than to require disclosure, the court shall proceed in accordance with subdivision (b).

(b) When a court is ruling on a claim of privilege under Article 9 (commencing with Section 1040) of Chapter 4 (official information and identity of informer) or under Section 1060 (trade secret) or under subdivision (b) of Section 2018.030 of the Code of Civil Procedure (attorney work product) and is unable to do so without requiring disclosure of the information claimed to be privileged, the court may require the person from whom disclosure is sought or the person authorized to claim the privilege, or both, to disclose the information in chambers out of the presence and hearing of all persons except the person authorized to claim the privilege and any other persons as the person authorized to claim the privilege is willing to have present. If the judge determines that the information is

closure, but the Appellate Division of the New York Supreme Court upheld the order, explaining:

In view of the intensive publicity surrounding the trial, press access to the hearing would undoubtedly raise a significant danger that information concerning the substance of the challenged evidence will reach the sitting jurors — and this notwithstanding admonitions to them not to read or listen to reports about the case. That danger would require additional interrogation of the jurors, needlessly and significantly prolonging this already lengthy trial and, in itself, causing additional prejudice. Moreover, such interrogation would not necessarily root out prejudice caused by public disclosure of inadmissible evidence. And, indeed, it might well demonstrate the necessity for declaring a mistrial.

The evidence proffered by the prosecution was extremely damaging to the defendant and, at the time the respondent Justice issued his closure order, was of untested admissibility. Weighing these circumstances against the legitimate rights of the press, and noting particularly the circumstance that the trial is actually underway, we hold that the respondent Justice properly closed the hearing to the public pending a determination of the admissibility of the challenged evidence.³¹⁴

The Appellate Division further considered whether the lower court should have to immediately release the transcript of the admissibility hearing. It explained that “[a]n appropriate respect for the inestimable service provided to the public by a thriving and untrammelled press *requires that the press be given*

privileged, neither the judge nor any other person may ever disclose, without the consent of a person authorized to permit disclosure, what was disclosed in the course of the proceedings in chambers.

(Emphasis added.)

The Law Revision Commission’s Comment to Section 915 explains:

Subdivision (a) states the general rule that revelation of information asserted to be privileged may not be compelled in order to determine whether or not it is privileged. This codifies existing law.

Subdivision (b) provides an exception to the general rule for information claimed to be privileged under Section 1040 (official information), Section 1041 (identity of an informer), or Section 1060 (trade secret). These privileges exist only if the interest in maintaining the secrecy of the information outweighs the interest in seeing that justice is done in the particular case. In at least some cases, it will be necessary for the judge to examine the information claimed to be privileged in order to balance these competing considerations intelligently. Even in these cases, Section 915 undertakes to give adequate protection to the person claiming the privilege by providing that the information be disclosed in confidence to the judge and requiring that it be kept in confidence if it is found to be privileged.

The exception in subdivision (b) applies only when a court is ruling on the claim of privilege. Thus, in view of subdivision (a), disclosure of the information cannot be required, for example, in an administrative proceeding.

(Citations omitted.)

314. *Id.* at 235 (citation omitted).

access to all information as quickly and as fully as possible consistent with a defendant's right to a fair trial."³¹⁵ It therefore concluded that the lower court should *immediately* release a *redacted* transcript:

Consistent with the view that any interference with the freedom of the press and the public's right to know should be held to the absolute minimum necessary to protect a defendant's right to a fair trial, a transcript of the hearing, *redacted so as to exclude matters pertaining to evidence which the respondent Justice has ruled to be inadmissible at trial*, should immediately be made available to the press.³¹⁶

The Appellate Division also held that *the redacted portion of the transcript, relating solely to matters held inadmissible*, "may properly be released at such time as the jury is sequestered or when, in the judgment of the respondent Justice, the possibility that the jury will learn of inadmissible evidence is otherwise negated, whichever is earlier."³¹⁷

In closing, the Appellate Division cautioned that "[t]he balance between a defendant's right to a fair trial and the right of the press and public to access to criminal proceedings is a most delicate one."³¹⁸ Its decision sought to "harmonize and give effect to those rights to the greatest extent possible by protecting the defendant against unfair prejudice while at the same time permitting the press to perform its traditional and essential function of informing the people of matters of public interest and concern."³¹⁹

315. *Id.* at 236 (emphasis added).

316. *Id.* at 237 (emphasis added).

317. *Id.* (emphasis added).

318. *Id.*

319. *Id.* For a more recent case upholding limited closures of a criminal case, including withholding of videotaped confessions and police notes from the press when "the court had not yet ruled on the admissibility of the confessions," see *Matter of Daily News, L.P. v. Wiley*, 126 A.D.3d 511, 513, 6 N.Y.S. 3d 19 (N.Y. App. Div. 2015). Although the appellate court upheld the trial court's orders, it emphasized the importance of complying with the constitutional requirements for sealing and closure:

While we find, on the available record, that the trial court acted within its discretion and appropriately balanced the competing constitutional mandates before closing the courtroom and sealing certain records, we caution that going forward, the court must adhere strictly to the procedures set forth in the controlling case law including affording a full opportunity by any interested members of the press to be heard, and making specific findings to support its determination without revealing the subject or issue, before closing the courtroom or sealing exhibits. We remind the trial court that it cannot close the courtroom or seal evidence and transcripts merely because the parties are consenting to same and the case has obtained notoriety.

Id. at 515 (citation omitted).

For a contrasting case, in which an appellate court directed a trial judge to "open [a] suppression hearing to the press and the public, to make available to the press and public all papers filed in connection with [a] motion ... to suppress evidence, and to permit the public and

The Commission's ongoing study involves a different type of delicate balance: the balance between the interests underlying mediation confidentiality, the interest in holding members of the State Bar accountable for misconduct, and the public right of access to information concerning the conduct of the people's business. In attempting to set the appropriate balance with regard to the trial or adjudication phase of a legal malpractice case based on mediation misconduct, the Commission will need to make two key determinations:

- (1) What standard should govern the *admissibility* of evidence of a mediation communication that is proffered in a legal malpractice case based on mediation misconduct?
- (2) To what extent, if any, should *public access* to the trial or adjudication phase of such a case be restricted to protect the confidentiality of mediation communications (e.g., by holding a hearing on admissibility *in camera* and sealing evidence the court rules inadmissible)?

We discuss each of those issues below.

(1) Standard Governing Admissibility

The Commission needs to select a standard to govern the *admissibility* of evidence of a mediation communication that is proffered in a legal malpractice case based on mediation misconduct.³²⁰ There are many different possibilities, including the following:

- **Option A: No Special Rule.** A court could simply treat evidence of a mediation communication the same way as any other evidence in the case.
- **Option B: Michigan & UMA § 6(b).** A court may admit evidence of a mediation communication only if the proponent of the evidence shows (a) that the evidence is not otherwise available,

the press to obtain transcripts of any hearings," see *Gannett Westchester Rockland Newspapers v. LaCava*, 158 A.D.2d 495, 497, 551 N.Y.S.2d 261 (N.Y. App. Div. 1990). The appellate court recognized that a suppression hearing "pose[s] a peculiar risk insofar as adverse pretrial publicity could inflame public opinion and taint potential jurors by exposing them to inadmissible evidence of a prejudicial nature." *Id.* In its view, however, "a hypothetical risk of prejudice cannot justify a categorical denial of access" and the case at hand did not meet "the requisite standards for excluding the public and the press from the courtroom" *Id.* The court nonetheless acknowledged that "the requirement of 'specific findings' is not so stringent as to effectively compel the divulgence of that which is sought to be kept confidential" *Id.*

320. The Commission has already decided to leave Evidence Code Section 703.5 as is (i.e., not to alter the circumstances under which a court must consider a mediator incompetent to testify). The discussion of admissibility in this memorandum is not intended to revisit the Commission's decision regarding Section 703.5 or any of the other decisions that the Commission has already made for purposes of a tentative recommendation. For a summary of those decisions, see discussion of "Current Contours of the Proposed New Exception" *supra*.

and (b) the need for the evidence substantially outweighs the interest in protecting confidentiality.³²¹

- **Option C: New Mexico.** A court may admit evidence of a mediation communication only if the proponent of the evidence shows that (a) the evidence is not otherwise available and (b) there is good cause for admitting the evidence.³²²
- **Option D: Texas.** If a statute protecting mediation confidentiality conflicts with a legal requirement for disclosure of communications, records, or materials, the issue may be presented to a court, which shall decide it based on the facts, circumstances, and context of the communications, records, or materials in question.³²³ The court may consider factors such as the following:
 - (1) Whether the mediation participant whose testimony is sought has knowledge of facts relevant to the pending claims.
 - (2) If the mediation participant has relevant knowledge, whether that evidence is critical to the pending claims.
 - (3) If the mediation participant has relevant knowledge, whether that evidence is protected by a privilege, such as the attorney-client privilege or the work product privilege.
 - (4) Whether, and to what extent, using the mediation participant's testimony would cause potential harm to the mediation process, particularly if it would reveal mediation confidences of someone who is not a party to the pending dispute.³²⁴
- **Option E: Wisconsin.** A court may admit evidence of a mediation communication only if it determines that admission is necessary to prevent a manifest injustice of sufficient magnitude to outweigh the importance of protecting the principle of confidentiality in mediation proceedings generally.³²⁵
- **Option F: Federal Administrative Dispute Resolution Act.** A court may admit evidence of a mediation communication only if the court determines that this is necessary to prevent harm to the public health or safety of sufficient magnitude in the particular case to outweigh the integrity of dispute resolution proceedings in

321. See Mich. Ct. R. 2.412(D)(12), which is discussed at pp. 10-12 of Memorandum 2015-55. See also UMA § 6(b), which is discussed at pp. 19-22 of Memorandum 2015-55.

322. See N.M. Stat. Ann. 44-7B-5(B), which is discussed at pp. 12-13 of Memorandum 2015-55.

323. See Tex. Civ. Prac. & Rem. Code § 154.073(e), which is discussed at pp. 13-18 of Memorandum 2015-55.

324. See *Avary v. Bank of America, N.A.*, 72 S.W.3d 779 (Tex. Ct. App. 2002), which is discussed at pp. 14-18 of Memorandum 2015-55.

325. See Wisc. Stat. § 904.085, which is discussed at pp. 18-19 of Memorandum 2015-55.

general by reducing confidence of parties in future cases that their communications will remain confidential.³²⁶

- **Option G: *Rinaker*.** In determining whether to admit evidence of a mediation communication, a trial court should weigh the competing interests and consider matters such as (1) whether the witness whose testimony is proffered has sufficient knowledge to testify competently regarding the alleged mediation communication, (2) the probative value of the alleged mediation communication (e.g., whether it was made under circumstances suggesting that it may be untrustworthy), and (3) whether the evidence would be cumulative.³²⁷
- **Option H: *Olam*.** Evidence of mediation communications is admissible only if (a) the trial judge determines, by considering all the circumstances and weighing the competing rights and interests, that the witness should testify regarding the mediation at an *in camera* hearing, and (b) based on the *in camera* testimony, the trial judge weighs and comparatively assesses the following matters and determines that the witness' testimony should be admitted:
 - (1) the importance of the values and interests that would be harmed if the witness was compelled to publicly testify.
 - (2) the magnitude of the harm that compelling the public testimony would cause to those values and interests.
 - (3) the importance of the rights or interests that would be jeopardized if the witness' testimony was not accessible in the specific proceedings in question, and
 - (4) how much the testimony would contribute towards protecting those rights or advancing those interests — an inquiry that includes, among other things, an assessment of whether there are alternative sources of evidence of comparable probative value.³²⁸

326. See 5 U.S.C. § 574(a)(4)(C), which is discussed at p. 22 of Memorandum 2015-55.

327. See *Rinaker v. Superior Court*, 62 Cal. App. 4th 155, 74 Cal. Rptr. 2d 464 (1998), which is discussed at pp. 23-25 of Memorandum 2015-55.

328. See *Olam*, 68 F. Supp. 2d 1110, which is discussed at pp. 25-30 of Memorandum 2015-55. In conducting the analysis described in the text, Magistrate Judge Brazil pointed to many specific factors, including:

- The legislative determination that without the promise of confidentiality it would be more difficult to achieve the goals of the court's mediation program.
- Whether the parties expressly waived mediation confidentiality protections.
- The nature of the testimony being sought, such as whether it would focus on a mediation participant's specific words as opposed to assessing a mediation participant's condition and capacities at a more general and impressionistic level.
- The interest in doing justice in an individual case.

The Commission need not select one of the above standards. It might instead want to draft its own standard of admissibility, perhaps by combining some aspects of the standards described above. Alternatively, the Commission might want to borrow a standard already used in another area of law. **Input on the appropriate standard of admissibility would be helpful.**

In selecting such a standard, **the Commission way wish to consider points like the following:**

- In determining whether to admit evidence of a mediation communication in a legal malpractice case based on mediation misconduct, does it matter whether the mediation communication is only marginally relevant to the case?
- Does it matter whether other evidence could be used to make the same point in the malpractice case instead of the mediation communication?
- Does it matter whether the mediation communication is sensitive in nature, particularly whether it reveals sensitive information about a mediation participant who is not a party to the malpractice case?
- Would the existing requirement of relevancy³²⁹ and the restrictions of Evidence Code Section 352³³⁰ be sufficient to address considerations like these?

Ultimately, **the choice of an admissibility standard turns in large part on the Commission's assessment of how much weight to assign to the competing policy interests at stake in this study.** It would therefore be inappropriate for the staff to make a recommendation on this matter.

-
- The interest in reassuring the community and the court about the integrity of the court's mediation program.
 - The potential impact of the proposed testimony on the attitudes and behavior of future participants in the court's mediation program.
 - The likelihood that the proposed testimony would be probative, material, and reliable.
 - Whether the proposed testimony would be from a presumptively disinterested, neutral source, and whether other such sources exist.

See *id.* at 1133-39.

329. Evid. Code § 350.

330. Evidence Code Section 352 provides:

352. The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury.

(2) Restrictions on Public Access

A second issue, separate and apart from selecting the *admissibility* standard for mediation evidence that is proffered in a legal malpractice case based on mediation misconduct, is to determine whether, and, if so, to what extent, to restrict *public access* to the trial or other adjudication phase of such a case to protect the confidentiality of mediation communications. In other words, the Commission needs to decide the extent, if any, to which a court may close courtroom proceedings in such a case, hold hearings *in camera*, seal or redact transcripts or other judicial records, and/or enter protective orders, so as to prevent public disclosure of mediation communications or disclosure of such communications to persons for whom they were not intended.

Possible approaches include most of the ones discussed in connection with the pleading phase of a legal malpractice case based on mediation misconduct:

- **Approach #1.** Seal, redact, present *in camera*, or otherwise insulate from public view all evidence or other material that discloses alleged mediation communications or information from which people could determine the likely content of alleged mediation communications.
- **Approach #3.** Seal, redact, or otherwise insulate from public view only alleged mediation communications *that are irrelevant* to the legal malpractice case. To effectively implement this approach, it may be necessary to restrict public access to all alleged mediation communications (e.g., by presenting them *in camera*) until the court assesses their relevancy.
- **Approach #4.** Seal, redact, or otherwise insulate from public view only alleged mediation communications *that would be inadmissible at trial*. To effectively implement this approach, it may be necessary to restrict access to all alleged mediation communications (e.g., by presenting them *in camera*) until the court rules on their admissibility.
- **Approach #5.** Give a court *discretion* to restrict public access to any mediation communication as long as that restriction is constitutional.
- **Approach #6.** *Require* a court to restrict public access to mediation communications to the greatest extent constitutionally permissible.

Approach #2 would no longer seem to be an option, because that approach entails only *temporary* shielding of mediation communications from public view before reaching the actual adjudication phase of a case.

As with the pleading stage, Commissioners and others following this study may be able to think of additional approaches, with different effects. Among other things, the Commission may wish to consider (1) whether some types of mediation communications are so sensitive that a mediation participant should not even have to disclose them to the court on an *in camera* basis, and (2) if so, how to determine which mediation communications fall into this category. **It would be helpful to receive suggestions and comments on this point, or on any approach described above or warranting consideration.**

As before, the staff makes no recommendation on which approach to select. **The Commission needs to select an approach that reflects its priorities and objectives and how much risk it wants to take.**

Assuming that the Commission chooses an approach that involves some restrictions on public access at this adjudicatory stage (aside from restrictions on public access to irrelevant evidence), the Commission will need to carefully draft the implementing legislation to comply with the constitutional requirements set forth in *NBC Subsidiary*. That might involve, for instance, developing special rules for a summary judgment motion in a legal malpractice case based on mediation misconduct. Such rules could perhaps be similar to the sealed record rules or the previously presented draft legislation on commencement of an action for legal malpractice in the mediation process.³³¹

The staff will begin the necessary drafting once the Commission provides general guidance on how much protection to provide to mediation communications in this context. Although we anticipate incorporating the constitutional requirements set forth in *NBC Subsidiary*, **it might be possible for courts to make some of the required findings on a routine basis and for the Commission's proposal to point out as much.**

For example, *NBC Subsidiary* requires a court to expressly find that “there exists an overriding interest supporting closure and/or sealing” and “there is a substantial probability that the interest will be prejudiced absent closure and/or sealing.”³³² In a legal malpractice case based on mediation misconduct, a court may be able to make those findings by referring to the possible legislative

331. See proposed Evid. Code §§ 1131 & 1132 and proposed Gov't Code §§ 70611.5 & 70613.5 in the discussion of “(2) Procedural Specifics and Related Matters” under “The Pleading Phase” *supra*.

332. See 20 Cal. 4th at 1217-18.

findings presented earlier in this memorandum (proposed Evidence Code Section 1130).³³³

Regardless of which specific approach it selects, the Commission might want to include a severability clause in its proposal, to help protect the proposal against invalidation on constitutional grounds. The Evidence Code already includes some such protection in Section 3, which provides:

3. If any provision or clause of this code or application thereof to any person or circumstances is held invalid, such invalidity shall not affect other provisions or applications of the code which can be given effect without the invalid provision or application, and to this end the provisions of this code are declared to be severable.

Nonetheless, **it might be helpful to include a provision along the following lines in the Commission's proposal if the proposal includes any restriction on public access:**

SEC. __. The provisions of this act are severable. If any provision of this act or its application is held invalid, that invalidity shall not affect other provisions or applications that can be given effect without the invalid provision or application.

Such a provision might largely duplicate the effect of Evidence Code Section 3, but it could serve to affirmatively demonstrate the drafters' intent regarding the effect of a constitutional flaw. A severability clause may also be useful if the Commission's proposal includes some sections that are located outside the Evidence Code.

Review by Appeal or Writ

Last but not least, the Commission should consider how to handle the appellate and writ review process in a legal malpractice case based on mediation misconduct. Should there be any restrictions on public access to mediation evidence at that stage of the litigation process?

Clearly, any restrictions on public access to mediation evidence in the appellate and writ review process of a legal malpractice case based on mediation misconduct **should complement and conform to whatever restrictions apply to the trial phase of such a case.**³³⁴

333. See discussion of "Is Mediation Confidentiality an 'Overriding Interest' That Would Support a Limitation on Public Access" *supra*.

334. See generally Cal. R. Ct. 8-45-8.47 (Exhibit pp. 8-19), which complement and conform to Cal. R. Ct. 2.550-2.551 (Exhibit pp. 1-7).

It is thus premature to discuss the drafting of provisions governing the appellate and writ review process. The staff will turn to that matter once the Commission provides guidance regarding the trial phase of a legal malpractice case based on mediation misconduct.

Some Advantages and Disadvantages

It is challenging to figure out how to effectively incorporate an *in camera* screening process and perhaps other, similar techniques into the Commission's proposal in a manner that would preserve significant protection for mediation confidentiality while staying within constitutional bounds. From reviewing the case law on the First Amendment right of access and California's related constitutional provisions, the staff is convinced that *any approach involving restrictions on public access to the trial or other adjudicatory phase of a legal malpractice case based on mediation misconduct must, at a minimum, be narrowly drawn so as to restrict public access no more than is really required in the particular circumstances of each case to protect the policy interests underlying mediation confidentiality.*

The staff sees the following advantages and disadvantages to such an approach:

- If well-drafted, such an approach probably would comply with the First Amendment right of access and the California constitutional provisions on public access.
- The approach presumably would call for the labor-intensive (document-by-document, testimony-by-testimony) type of judicial analysis used in the case law on the First Amendment right of access. While this would impose burdens on courts and litigants, the California Supreme Court in *NBC Subsidiary* appeared to regard such burdens as manageable and acceptable to ensure an appropriate balancing of competing interests.³³⁵ Because the First Amendment right of access does not apply to discovery proceedings and non-substantive motions, the actual burden may be somewhat less than it initially might appear.
- Depending on how it is structured, the approach may give much discretion to the judiciary to determine the proper degree of public access. That might be appropriate with regard to the topic in question, because any adverse impact on mediation will affect the functioning of the court system, and because the California Supreme Court is ultimately responsible for regulating attorneys in a manner that serves the needs of the public.

335. *NBC Subsidiary*, 20 Cal. 4th at 1218 (emphasis in original; footnotes omitted).

- It seems impossible to successfully prosecute a legal malpractice case based on mediation misconduct without disclosing at least some mediation communications to the court and other litigants, if not to the public. For that reason, and because the First Amendment mandates a “thumb-on-the scale” in favor of disclosure, a proposal along the lines the Commission is contemplating almost certainly would impede the predictability of mediation confidentiality to some degree even if the proposal employs *in camera* screening and perhaps similar judicial techniques to minimize such an effect. That would be particularly true if the proposal would give the judiciary broad discretion regarding disclosure of mediation communications.

The United States Supreme Court has warned that “[a]n uncertain privilege, or one which purports to be certain but results in widely varying applications by the courts, is little better than no privilege at all.”³³⁶ A measure of unpredictability already exists with regard to mediation confidentiality in California,³³⁷ but the Commission’s proposal as currently conceived could significantly increase that level. If the Commission eliminates the concept of *in camera* screening and related techniques from its proposal, that is likely to make California’s mediation confidentiality protections even more unpredictable.

This list of advantages and disadvantages is only intended to draw attention to some points that have *not previously been made* in the course of this study. It is *by no means* intended as a full analysis of the relevant pros and cons of the ideas that the Commission is exploring.

A Few Final Comments

Throughout this study, the Commission has seen the tension between (1) protecting the privacy of mediation communications so that mediation participants will feel safe candidly exploring settlement possibilities and (2) allowing sufficient disclosure of mediation communications so victims of mediation misconduct are able to obtain redress. The creation of a mediation confidentiality exception for attorney misconduct, which employs an *in camera* screening process and perhaps similar judicial techniques, may be a means to attain both of those objectives to some degree. However, the prospect of using an *in camera* screening process or similar judicial techniques to shield mediation communications from public view brings into play a third important policy

³³⁶. Jaffee v. Redmond, 518 U.S. 1, 18 (1996), *quoting* Upjohn Co. v. United States, 449 U.S. 383, 393 (1981).

³³⁷. See Memorandum 2014-58, pp. 30-32.

interest: The interest of the public in observing and monitoring the performance of its courts.

As this lengthy memorandum demonstrates, attempting to effectively juggle the mix of all three competing policy interests is tricky and complicated. But perhaps such an effort would eventually pay off from a policy standpoint.

The Commission should **think hard about whether to continue in this direction and, if so how to proceed.** The staff is eager for its guidance.

Stakeholders and other persons interested in this study could provide valuable assistance by **reviewing this memorandum carefully, focusing on the substantive issues raised in it, and offering specific insights, comments, suggestions, and other concrete information pertaining to those matters.** The Commission and its staff would much appreciate constructive input along those lines.

Respectfully submitted,

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CALIFORNIA RULES OF COURT 2.550-2.551

Chapter 3. Sealed Records

Rule 2.550. Sealed records

Rule 2.551. Procedures for filing records under seal

Rule 2.550. Sealed records

(a) Application

- (1) Rules 2.550–2.551 apply to records sealed or proposed to be sealed by court order.
- (2) These rules do not apply to records that are required to be kept confidential by law.
- (3) These rules do not apply to discovery motions and records filed or lodged in connection with discovery motions or proceedings. However, the rules do apply to discovery materials that are used at trial or submitted as a basis for adjudication of matters other than discovery motions or proceedings.

(Subd (a) amended effective January 1, 2007.)

(b) Definitions

As used in this chapter:

- (1) “Record.” Unless the context indicates otherwise, “record” means all or a portion of any document, paper, exhibit, transcript, or other thing filed or lodged with the court, by electronic means or otherwise.
- (2) “Sealed.” A “sealed” record is a record that by court order is not open to inspection by the public.
- (3) “Lodged.” A “lodged” record is a record that is temporarily placed or deposited with the court, but not filed.

(Subd (b) amended effective January 1, 2016; previously amended effective January 1, 2007.)

(c) Court records presumed to be open

Unless confidentiality is required by law, court records are presumed to be open.

(d) Express factual findings required to seal records

The court may order that a record be filed under seal only if it expressly finds facts that establish:

- (1) There exists an overriding interest that overcomes the right of public access to the record;
- (2) The overriding interest supports sealing the record;
- (3) A substantial probability exists that the overriding interest will be prejudiced if the record is not sealed;
- (4) The proposed sealing is narrowly tailored; and
- (5) No less restrictive means exist to achieve the overriding interest.

(Subd (d) amended effective January 1, 2004.)

(e) Content and scope of the order

- (1) An order sealing the record must:
 - (A) Specifically state the facts that support the findings; and
 - (B) Direct the sealing of only those documents and pages, or, if reasonably practicable, portions of those documents and pages, that contain the material that needs to be placed under seal. All other portions of each document or page must be included in the public file.
- (2) Consistent with Code of Civil Procedure sections 639 and 645.1, if the records that a party is requesting be placed under seal are voluminous, the court may appoint a referee and fix and allocate the referee's fees among the parties.

(Subd (e) amended effective January 1, 2007; previously amended effective January 1, 2004.)

Rule 2.550 amended effective January 1, 2016; adopted as rule 243.1 effective January 1, 2001; previously amended effective January 1, 2004; previously amended and renumbered as rule 2.550 effective January 1, 2007.

Advisory Committee Comment

This rule and rule 2.551 provide a standard and procedures for courts to use when a request is made to seal a record. The standard is based on *NBC Subsidiary (KNBC-TV), Inc. v. Superior Court* (1999) 20 Cal.4th 1178. These rules apply to civil and criminal cases. They recognize the First Amendment right of access to documents used at trial or as a basis of adjudication. The rules do not apply to records that courts must keep confidential by law. Examples of confidential records to which public access is restricted by law are records of the family conciliation court (Family Code, § 1818(b)), in forma pauperis applications (Cal. Rules of Court, rules 3.54 and 8.26), and search warrant affidavits sealed under *People v. Hobbs* (1994) 7 Cal.4th 948. The sealed records rules also do not apply to discovery proceedings, motions, and materials that are not used at trial or submitted to the court as a basis for adjudication. (See *NBC Subsidiary, supra*, 20 Cal.4th at pp. 1208–1209, fn. 25.)

Rule 2.550(d)–(e) is derived from *NBC Subsidiary*. That decision contains the requirements that the court, before closing a hearing or sealing a transcript, must find an “overriding interest” that supports the closure or sealing, and must make certain express findings. (*Id.* at pp. 1217–1218.) The decision notes that the First Amendment right of access applies to records filed in both civil and criminal cases as a basis for adjudication. (*Id.* at pp. 1208–1209, fn. 25.) Thus, the *NBC Subsidiary* test applies to the sealing of records.

NBC Subsidiary provides examples of various interests that courts have acknowledged may constitute “overriding interests.” (See *id.* at p. 1222, fn. 46.) Courts have found that, under appropriate circumstances, various statutory privileges, trade secrets, and privacy interests, when properly asserted and not waived, may constitute “overriding interests.” The rules do not attempt to define what may constitute an “overriding interest,” but leave this to case law.

Rule 2.551. Procedures for filing records under seal

(a) Court approval required

A record must not be filed under seal without a court order. The court must not permit a record to be filed under seal based solely on the agreement or stipulation of the parties.

(Subd (a) amended effective January 1, 2007.)

(b) Motion or application to seal a record

(1) Motion or application required

A party requesting that a record be filed under seal must file a motion or an application for an order sealing the record. The motion or application must be accompanied by a memorandum and a declaration containing facts sufficient to justify the sealing.

(2) Service of motion or application

A copy of the motion or application must be served on all parties that have appeared in the case. Unless the court orders otherwise, any party that already has access to the records to be placed under seal must be served with a complete, unredacted version

of all papers as well as a redacted version. Other parties must be served with only the public redacted version. If a party's attorney but not the party has access to the record, only the party's attorney may be served with the complete, unredacted version.

(3) *Procedure for party not intending to file motion or application*

- (A) A party that files or intends to file with the court, for the purposes of adjudication or to use at trial, records produced in discovery that are subject to a confidentiality agreement or protective order, and does not intend to request to have the records sealed, must:
- (i) Lodge the unredacted records subject to the confidentiality agreement or protective order and any pleadings, memorandums, declarations, and other documents that disclose the contents of the records, in the manner stated in (d);
 - (ii) File copies of the documents in (i) that are redacted so that they do not disclose the contents of the records that are subject to the confidentiality agreement or protective order; and
 - (iii) Give written notice to the party that produced the records that the records and the other documents lodged under (i) will be placed in the public court file unless that party files a timely motion or application to seal the records under this rule.
- (B) If the party that produced the documents and was served with the notice under (A)(iii) fails to file a motion or an application to seal the records within 10 days or to obtain a court order extending the time to file such a motion or an application, the clerk must promptly remove all the documents in (A)(i) from the envelope, container, or secure electronic file where they are located and place them in the public file. If the party files a motion or an application to seal within 10 days or such later time as the court has ordered, these documents are to remain conditionally under seal until the court rules on the motion or application and thereafter are to be filed as ordered by the court.

(4) *Lodging of record pending determination of motion or application*

The party requesting that a record be filed under seal must lodge it with the court under (d) when the motion or application is made, unless good cause exists for not lodging it or the record has previously been lodged under (3)(A)(i). Pending the determination of the motion or application, the lodged record will be conditionally under seal.

(5) *Redacted and unredacted versions*

If necessary to prevent disclosure, any motion or application, any opposition, and any supporting documents must be filed in a public redacted version and lodged in a complete, unredacted version conditionally under seal. The cover of the redacted version must identify it as "Public—Redacts materials from conditionally sealed record." The cover of the unredacted version must identify it as "May Not Be Examined Without Court Order—Contains material from conditionally sealed record."

(6) *Return of lodged record*

If the court denies the motion or application to seal, the clerk must return the lodged record to the submitting party and must not place it in the case file unless that party notifies the clerk in writing that the record is to be filed. Unless otherwise ordered by the court, the submitting party must notify the clerk within 10 days after the order denying the motion or application.

(Subd (b) amended effective January 1, 2016; previously amended effective January 1, 2004, and January 1, 2007.)

(c) **References to nonpublic material in public records**

A record filed publicly in the court must not disclose material contained in a record that is sealed, conditionally under seal, or subject to a pending motion or an application to seal.

(Subd (c) amended effective January 1, 2004.)

(d) **Procedure for lodging of records**

- (1) A record that may be filed under seal must be transmitted to the court in a secure manner that preserves the confidentiality of the records to be lodged. If the record is transmitted in paper form, it must be put in an envelope or other appropriate container, sealed in the envelope or container, and lodged with the court.
- (2) The materials to be lodged under seal must be clearly identified as "CONDITIONALLY UNDER SEAL." If the materials are transmitted in paper form, the envelope or container lodged with the court must be labeled "CONDITIONALLY UNDER SEAL."
- (3) The party submitting the lodged record must affix to the electronic transmission, the envelope, or the container a cover sheet that:
 - (A) Contains all the information required on a caption page under rule 2.111; and
 - (B) States that the enclosed record is subject to a motion or an application to file the record under seal.

- (4) On receipt of a record lodged under this rule, the clerk must endorse the affixed cover sheet with the date of its receipt and must retain but not file the record unless the court orders it filed.

(Subd (d) amended effective January 1, 2016; previously amended effective January 1, 2004, and January 1, 2007.)

(e) Order

- (1) If the court grants an order sealing a record and if the sealed record is in paper format, the clerk must substitute on the envelope or container for the label required by (d)(2) a label prominently stating “SEALED BY ORDER OF THE COURT ON (DATE),” and must replace the cover sheet required by (d)(3) with a filed-endorsed copy of the court’s order. If the sealed record is in an electronic format, the clerk must file the court’s order, store the record ordered sealed in a secure manner, and clearly identify the record as sealed by court order on a specified date.
- (2) The order must state whether—in addition to the sealed records—the order itself, the register of actions, any other court records, or any other records relating to the case are to be sealed.
- (3) The order must state whether any person other than the court is authorized to inspect the sealed record.
- (4) Unless the sealing order provides otherwise, it prohibits the parties from disclosing the contents of any materials that have been sealed in anything that is subsequently publicly filed.

(Subd (e) amended effective January 1, 2016; previously amended effective January 1, 2004, and January 1, 2007.)

(f) Custody of sealed records

Sealed records must be securely filed and kept separate from the public file in the case.

(Subd (f) amended effective January 1, 2004.)

(g) Custody of voluminous records

If the records to be placed under seal are voluminous and are in the possession of a public agency, the court may by written order direct the agency instead of the clerk to maintain custody of the original records in a secure fashion. If the records are requested by a reviewing court, the trial court must order the public agency to deliver the records to the clerk for transmission to the reviewing court under these rules.

(h) Motion, application, or petition to unseal records

- (1) A sealed record must not be unsealed except on order of the court.
- (2) A party or member of the public may move, apply, or petition, or the court on its own motion may move, to unseal a record. Notice of any motion, application, or petition to unseal must be filed and served on all parties in the case. The motion, application, or petition and any opposition, reply, and supporting documents must be filed in a public redacted version and a sealed complete version if necessary to comply with (c).
- (3) If the court proposes to order a record unsealed on its own motion, the court must give notice to the parties stating the reason for unsealing the record. Unless otherwise ordered by the court, any party may serve and file an opposition within 10 days after the notice is provided and any other party may file a response within 5 days after the filing of an opposition.
- (4) In determining whether to unseal a record, the court must consider the matters addressed in rule 2.550(c)–(e).
- (5) The order unsealing a record must state whether the record is unsealed entirely or in part. If the court's order unseals only part of the record or unseals the record only as to certain persons, the order must specify the particular records that are unsealed, the particular persons who may have access to the record, or both. If, in addition to the records in the envelope, container, or secure electronic file, the court has previously ordered the sealing order, the register of actions, or any other court records relating to the case to be sealed, the unsealing order must state whether these additional records are unsealed.

(Subd (h) amended effective January 1, 2016; previously amended effective January 1, 2004, and January 1, 2007.)

Rule 2.551 amended effective January 1, 2016; adopted as rule 243.2 effective January 1, 2001; previously amended effective January 1, 2004; previously amended and renumbered as rule 2.551 effective January 1, 2007.

Article 3. Sealed and Confidential Records

Title 8, Appellate Rules—Division 1, Rules Relating to the Supreme Court and Courts of Appeal—Chapter 1, General Provisions—Article 3, Sealed and Confidential Records; adopted effective January 1, 2014.

Rule 8.45. General provisions

Rule 8.46. Sealed records

Rule 8.47. Confidential records

Rule 8.45. General provisions

(a) Application

The rules in this article establish general requirements regarding sealed and confidential records in appeals and original proceedings in the Supreme Court and Courts of Appeal. Where other laws establish specific requirements for particular types of sealed or confidential records that differ from the requirements in this article, those specific requirements supersede the requirements in this article.

(b) Definitions

As used in this article:

- (1) “Record” means all or part of a document, paper, exhibit, transcript, or other thing filed or lodged with the court by electronic means or otherwise.
- (2) A “lodged” record is a record temporarily deposited with the court but not filed.
- (3) A “sealed” record is a record that is closed to inspection by the public or a party by order of a court under rules 2.550–2.551 or rule 8.46.
- (4) A “conditionally sealed” record is a record that is filed or lodged subject to a pending application or motion to file it under seal.
- (5) A “confidential” record is a record that, in court proceedings, is required by statute, rule of court, or other authority except a court order under rules 2.550–2.551 or rule 8.46 to be closed to inspection by the public or a party.
- (6) A “redacted version” is a version of a filing from which all portions that disclose material contained in a sealed, conditionally sealed, or confidential record have been removed.

- (7) An “unredacted version” is a version of a filing or a portion of a filing that discloses material contained in a sealed, conditionally sealed, or confidential record.

(Subd (b) amended effective January 1, 2016.)

(c) Format of sealed and confidential records

- (1) Unless otherwise provided by law or court order, sealed or confidential records that are part of the record on appeal or the supporting documents or other records accompanying a motion, petition for a writ of habeas corpus, other writ petition, or other filing in the reviewing court must be kept separate from the rest of a clerk’s or reporter’s transcript, appendix, supporting documents, or other records sent to the reviewing court and in a secure manner that preserves their confidentiality.
- (A) If the records are in paper format, they must be placed in a sealed envelope or other appropriate sealed container. This requirement does not apply to a juvenile case file but does apply to any record contained within a juvenile case file that is sealed or confidential under authority other than Welfare and Institutions Code section 827 et seq.
- (B) Sealed records, and if applicable the envelope or other container, must be marked as “Sealed by Order of the Court on *(Date)*.”
- (C) Confidential records, and if applicable the envelope or other container, must be marked as “Confidential *(Basis)*—May Not Be Examined Without Court Order.” The basis must be a citation to or other brief description of the statute, rule of court, case, or other authority that establishes that the record must be closed to inspection in the court proceeding.
- (D) The superior court clerk or party transmitting sealed or confidential records to the reviewing court must prepare a sealed or confidential index of these materials. If the records include a transcript of any in-camera proceeding, the index must list the date and the names of all parties present at the hearing and their counsel. This index must be transmitted and kept with the sealed or confidential records.
- (2) Except as provided in (3) or by court order, the alphabetical and chronological indexes to a clerk’s or reporter’s transcript, appendix, supporting documents, or other records sent to the reviewing court that are available to the public must list each sealed or confidential record by title, not disclosing the substance of the record, and must identify it as “Sealed” or “Confidential”—May Not Be Examined Without Court Order.”
- (3) Records relating to a request for funds under Penal Code section 987.9 or other proceedings the occurrence of which is not to be disclosed under the court order or applicable law must not be bound together with, or electronically transmitted as a single document with, other sealed or confidential records and must not be listed in

the index required under (1)(D) or the alphabetical or chronological indexes to a clerk's or reporter's transcript, appendix, supporting documents to a petition, or other records sent to the reviewing court.

(Subd (c) amended effective January 1, 2016.)

(d) Transmission of and access to sealed and confidential records

- (1) Unless otherwise provided by (2)–(4) or other law or court order, a sealed or confidential record that is part of the record on appeal or the supporting documents or other records accompanying a motion, petition for a writ of habeas corpus, other writ petition, or other filing in the reviewing court must be transmitted only to the reviewing court and the party or parties who had access to the record in the trial court or other proceedings under review and may be examined only by the reviewing court and that party or parties. If a party's attorney but not the party had access to the record in the trial court or other proceedings under review, only the party's attorney may examine the record.
- (2) Except as provided in (3), if the record is a reporter's transcript or any document related to any in-camera hearing from which a party was excluded in the trial court, the record must be transmitted to and examined by only the reviewing court and the party or parties who participated in the in-camera hearing.
- (3) A reporter's transcript or any document related to an in-camera hearing concerning a confidential informant under Evidence Code sections 1041–1042 must be transmitted only to the reviewing court.
- (4) A probation report must be transmitted only to the reviewing court and to appellate counsel for the People and the defendant who was the subject of the report.

Rule 8.45 amended effective January 1, 2016; adopted effective January 1, 2014.

Advisory Committee Comment

Subdivision (a). Many laws address sealed and confidential records. These laws differ from each other in a variety of respects, including what information is closed to inspection, from whom it is closed, under what circumstances it is closed, and what procedures apply to closing or opening it to inspection. It is very important to determine if any such law applies with respect to a particular record because where other laws establish specific requirements that differ from the requirements in this article, those specific requirements supersede the requirements in this article.

Subdivision (b)(5). Examples of confidential records are records in juvenile proceedings (Welf. & Inst. Code, § 827 and California Rules of Court, rule 8.401), records of the family conciliation court (Fam. Code, § 1818(b)), fee waiver applications (Gov. Code, § 68633(f)), and court-ordered diagnostic reports (Penal Code, § 1203.03). This term also encompasses records closed to inspection by a court order other than an order under rules 2.550–2.551 or 8.46, such as situations in which case law, statute, or rule has established a category of records that must be closed to inspection and a court has found that a particular record falls within that category and has ordered that it be closed to inspection. Examples include

discovery material subject to a protective order under Code of Civil Procedure sections 2030.090, 2032.060, or 2033.080 and records closed to inspection by court order under *People v. Marsden* (1970) 2 Cal.3d 118 or *Pitchess v. Superior Court* (1974) 11 Cal.3d 531. For more examples of confidential records, please see appendix 1 of the *Trial Court Records Manual* at www.courts.ca.gov/documents/trial-court-records-manual.pdf.

Subdivisions (c) and (d). The requirements in this rule for format and transmission of and access to sealed and confidential records apply only unless otherwise provided by law. Special requirements that govern transmission of and/or access to particular types of records may supersede the requirements in this rule. For example, rules 8.619(g) and 8.622(e) require copies of reporters' transcripts in capital cases to be sent to the Habeas Corpus Resource Center and the California Appellate Project in San Francisco, and under rules 8.336(d) and 8.409(e), in non-capital felony appeals, if the defendant—or in juvenile appeals, if the appellant or the respondent—is not represented by appellate counsel when the transcripts are certified as correct, the clerk must send that counsel's copy of the transcripts to the district appellate project.

Subdivision (c)(1)(C). For example, for juvenile records, this mark could state "Confidential—Welf. & Inst. Code, § 827" or "Confidential—Juvenile Case File"; for a fee waiver application, this mark could state "Confidential—Gov. Code, § 68633(f)" or "Confidential—Fee Waiver Application"; and for a transcript of an in-camera hearing under *People v. Marsden* (1970) 2 Cal.3d 118, this mark could say "Confidential—Marsden Hearing."

Subdivision (c)(2). Subdivision (c)(2) requires that, with certain exceptions, the alphabetical and chronological indexes to the clerk's and reporter's transcripts, appendixes, and supporting documents must list any sealed and confidential records but identify them as sealed or confidential. The purpose of this provision is to assist the parties in making—and the court in adjudicating—motions to unseal sealed records or to provide confidential records to a party. To protect sealed and confidential records from disclosure until the court issues an order, however, each index must identify sealed and confidential records without disclosing their substance.

Subdivision (c)(3). Under certain circumstances, the Attorney General has a statutory right to request copies of documents filed under Penal Code section 987.9(d). To facilitate compliance with such requests, this subdivision requires that such documents not be bound with other confidential documents.

Subdivision (d). See rule 8.47(b) for special requirements concerning access to certain confidential records.

Subdivision (d)(4). This rule limits to whom a copy of a probation report is transmitted based on the provisions of Penal Code section 1203.05, which limit who may inspect or copy probation reports.

Rule 8.46. Sealed records

(a) Application

This rule applies to sealed records and records proposed to be sealed on appeal and in original proceedings, but does not apply to confidential records.

(Subd (a) amended effective January 1, 2014; previously amended effective January 1, 2006, and January 1, 2007.)

(b) Record sealed by the trial court

If a record sealed by order of the trial court is part of the record on appeal or the supporting documents or other records accompanying a motion, petition for a writ of habeas corpus, other writ petition, or other filing in the reviewing court:

- (1) The sealed record must remain sealed unless the reviewing court orders otherwise under (e). Rule 8.45 governs the form and transmission of and access to sealed records.
- (2) The record on appeal or supporting documents filed in the reviewing court must also include:
 - (A) The motion or application to seal filed in the trial court;
 - (B) All documents filed in the trial court supporting or opposing the motion or application; and
 - (C) The trial court order sealing the record.

(Subd (b) amended and relettered effective January 1, 2014; adopted as subd (c); previously amended effective January 1, 2004, and January 1, 2007.)

(c) Record not sealed by the trial court

A record filed or lodged publicly in the trial court and not ordered sealed by that court must not be filed under seal in the reviewing court.

(Subd (c) relettered effective January 1, 2014; adopted as subd (d).)

(d) Record not filed in the trial court; motion or application to file under seal

- (1) A record not filed in the trial court may be filed under seal in the reviewing court only by order of the reviewing court; it must not be filed under seal solely by stipulation or agreement of the parties.
- (2) To obtain an order under (1), a party must serve and file a motion or application in the reviewing court, accompanied by a declaration containing facts sufficient to justify the sealing. At the same time, the party must lodge the record under (3), unless good cause is shown not to lodge it.
- (3) To lodge a record, the party must transmit the record to the court in a secure manner that preserves the confidentiality of the record to be lodged. The record must be transmitted separate from the rest of a clerk's or reporter's transcript, appendix, supporting documents, or other records sent to the reviewing court with a cover sheet that complies with rule 8.40(c) and labels the contents as "CONDITIONALLY

UNDER SEAL.” If the record is in paper format, it must be placed in a sealed envelope or other appropriate sealed container.

- (4) If necessary to prevent disclosure of material contained in a conditionally sealed record, any motion or application, any opposition, and any supporting documents must be filed in a redacted version and lodged in a complete unredacted version conditionally under seal. The cover of the redacted version must identify it as “Public—Redacts material from conditionally sealed record.” In juvenile cases, the cover of the redacted version must identify it as “Redacted version—Redacts material from conditionally sealed record.” The cover of the unredacted version must identify it as “May Not Be Examined Without Court Order—Contains material from conditionally sealed record.” Unless the court orders otherwise, any party that had access to the record in the trial court or other proceedings under review must be served with a complete, unredacted version of all papers as well as a redacted version.
- (5) On receiving a lodged record, the clerk must note the date of receipt on the cover sheet and retain but not file the record. The record must remain conditionally under seal pending determination of the motion or application.
- (6) The court may order a record filed under seal only if it makes the findings required by rule 2.550(d)–(e).
- (7) If the court denies the motion or application, the clerk must not place the lodged record in the case file but must return it to the submitting party unless that party notifies the clerk in writing that the record is to be filed. Unless otherwise ordered by the court, the submitting party must notify the clerk within 10 days after the order denying the motion or application.
- (8) An order sealing the record must direct the sealing of only those documents and pages or, if reasonably practical, portions of those documents and pages, that contain the material that needs to be placed under seal. All other portions of each document or page must be included in the public file.
- (9) Unless the sealing order provides otherwise, it prohibits the parties from disclosing the contents of any materials that have been sealed in anything that is subsequently publicly filed.

(Subd (d) amended effective January 1, 2016; adopted as subd (e); previously amended effective July 1, 2002, January 1, 2004, and January 1, 2007; previously amended and relettered as subd (d) effective January 1, 2014.)

(e) Unsealing a record in the reviewing court

- (1) A sealed record must not be unsealed except on order of the reviewing court.

- (2) Any person or entity may serve and file a motion, application, or petition in the reviewing court to unseal a record.
- (3) If the reviewing court proposes to order a record unsealed on its own motion, the court must send notice to the parties. Unless otherwise ordered by the court, any party may serve and file an opposition within 10 days after the notice is sent, and any other party may serve and file a response within 5 days after an opposition is filed.
- (4) If necessary to prevent disclosure of material contained in a sealed record, the motion, application, or petition under (2) and any opposition, response, and supporting documents under (2) or (3) must be filed in both a redacted version and a complete unredacted version. The cover of the redacted version must identify it as "Public—Redacts material from sealed record." In juvenile cases, the cover of the redacted version must identify it as "Redacted version—Redacts material from sealed record." The cover of the unredacted version must identify it as "May Not Be Examined Without Court Order—Contains material from sealed record." Unless the court orders otherwise, any party that had access to the sealed record in the trial court or other proceedings under review must be served with a complete, unredacted version of all papers as well as a redacted version. If a party's attorney but not the party had access to the record in the trial court or other proceedings under review, only the party's attorney may be served with the complete, unredacted version.
- (5) In determining whether to unseal a record, the court must consider the matters addressed in rule 2.550(c)–(e).
- (6) The order unsealing a record must state whether the record is unsealed entirely or in part. If the order unseals only part of the record or unseals the record only as to certain persons, the order must specify the particular records that are unsealed, the particular persons who may have access to the record, or both.
- (7) If, in addition to the record that is the subject of the sealing order, a court has previously ordered the sealing order itself, the register of actions, or any other court records relating to the case to be sealed, the unsealing order must state whether these additional records are unsealed.

(Subd (e) amended effective January 1, 2016; adopted as subd (f); previously amended effective January 1, 2004, and January 1, 2007; previously amended and relettered as subd (e) effective January 1, 2014.)

(f) Disclosure of nonpublic material in public filings prohibited

- (1) Nothing filed publicly in the reviewing court—including any application, brief, petition, or memorandum—may disclose material contained in a record that is sealed, lodged conditionally under seal, or otherwise subject to a pending motion to file under seal.
- (2) If it is necessary to disclose material contained in a sealed record in a filing in the reviewing court, two versions must be filed:

- (A) A public redacted version. The cover of this version must identify it as “Public—Redacts material from sealed record.” In juvenile cases, the cover of the redacted version must identify it as “Redacted Version—Redacts material from sealed record.”
 - (B) An unredacted version. If this version is in paper format, it must be placed in a sealed envelope or other appropriate sealed container. The cover of this version, and if applicable the envelope or other container, must identify it as “May Not Be Examined Without Court Order—Contains material from sealed record.” Sealed material disclosed in this version must be identified and accompanied by a citation to the court order sealing that material.
 - (C) Unless the court orders otherwise, any party who had access to the sealed record in the trial court or other proceedings under review must be served with both the unredacted version of all papers as well as the redacted version. Other parties must be served with only the public redacted version. If a party’s attorney but not the party had access to the record in the trial court or other proceedings under review, only the party’s attorney may be served with the unredacted version.
- (3) If it is necessary to disclose material contained in a conditionally sealed record in a filing in the reviewing court:
- (A) A public redacted version must be filed. The cover of this version must identify it as “Public—Redacts material from conditionally sealed record.” In juvenile cases, the cover of the redacted version must identify it as “Redacted version—Redacts material from conditionally sealed record.”
 - (B) An unredacted version must be lodged. If this version is in paper format, it must be placed in a sealed envelope or other appropriate sealed container. The cover of this version, and if applicable the envelope or other container, must identify it as “May Not Be Examined Without Court Order—Contains material from conditionally sealed record.” Conditionally sealed material disclosed in this version must be identified.
 - (C) Unless the court orders otherwise, any party who had access to the conditionally sealed record in the trial court or other proceedings under review must be served with both the unredacted version of all papers as well as the redacted version. Other parties must be served with only the public redacted version.
 - (D) If the court denies the motion or application to seal the record, the clerk must not place the unredacted version lodged under (B) in the case file but must return it to the party who filed the application or motion to seal unless that

party notifies the clerk that the record is to be publicly filed, as provided in (d)(7).

(Subd (f) amended and relettered effective January 1, 2014; adopted as subd (g); previously amended effective January 1, 2007.)

Rule 8.46 amended effective January 1, 2016; repealed and adopted as rule 12.5 effective January 1, 2002; previously amended and renumbered as rule 8.160 effective January 1, 2007; previously renumbered as rule 8.46 effective January 1, 2010; previously amended effective July 1, 2002, January 1, 2004, January 1, 2006, and January 1, 2014.

Advisory Committee Comment

This rule and rules 2.550–2.551 for the trial courts provide a standard and procedures for courts to use when a request is made to seal a record. The standard is based on *NBC Subsidiary (KNBC-TV), Inc. v. Superior Court* (1999) 20 Cal.4th 1178. The sealed records rules apply to civil and criminal cases. They recognize the First Amendment right of access to documents used at trial or as a basis of adjudication. Except as otherwise expressly provided in this rule, motions in a reviewing court relating to the sealing or unsealing of a record must follow rule 8.54.

Rule 8.47. Confidential records

(a) Application

This rule applies to confidential records but does not apply to records sealed by court order under rules 2.550–2.551 or rule 8.46 or to conditionally sealed records under rule 8.46. Unless otherwise provided by this rule or other law, rule 8.45 governs the form and transmission of and access to confidential records.

(b) Records of *Marsden* hearings and other in-camera proceedings

- (1) This subdivision applies to reporter's transcripts of and documents filed or lodged by a defendant in connection with:
 - (A) An in-camera hearing conducted by the superior court under *People v. Marsden* (1970) 2 Cal.3d 118; or
 - (B) Another in-camera hearing at which the defendant was present but from which the People were excluded in order to prevent disclosure of information about defense strategy or other information to which the prosecution was not allowed access at the time of the hearing.
- (2) Except as provided in (3), if the defendant raises a *Marsden* issue or an issue related to another in-camera hearing covered by this rule in a brief, petition, or other filing in the reviewing court, the following procedures apply:
 - (A) The brief, including any portion that discloses matters contained in the transcript of the in-camera hearing and other documents filed or lodged in

connection with the hearing, must be filed publicly. The requirement to publicly file this brief does not apply in juvenile cases; rule 8.401 governs the format of and access to such briefs in juvenile cases.

- (B) The People may serve and file an application requesting a copy of the reporter's transcript of and documents filed or lodged by a defendant in connection with the in-camera hearing.
 - (C) Within 10 days after the application is filed, the defendant may serve and file opposition to this application on the basis that the transcript or documents contain confidential material not relevant to the issues raised by the defendant in the reviewing court. Any such opposition must identify the page and line numbers of the transcript or documents containing this irrelevant material.
 - (D) If the defendant does not timely serve and file opposition to the application, the reviewing court clerk must send to the People a copy of the reporter's transcript of and documents filed or lodged by a defendant in connection with the in-camera hearing.
- (3) A defendant may serve and file a motion or application in the reviewing court requesting permission to file under seal a brief, petition, or other filing that raises a *Marsden* issue or an issue related to another in-camera hearing covered by this subdivision and requesting an order maintaining the confidentiality of the relevant material from the reporter's transcript of or documents filed or lodged in connection with the in-camera hearing.
- (A) Except as otherwise provided in this rule, rule 8.46(d) governs a motion or application under this subdivision.
 - (B) The declaration accompanying the motion or application must contain facts sufficient to justify an order maintaining the confidentiality of the relevant material from the reporter's transcript of or documents filed or lodged in connection with the in-camera hearing and sealing of the brief, petition, or other filing.
 - (C) At the time the motion or application is filed, the defendant must:
 - (i) File a public redacted version of the brief, petition, or other filing that he or she is requesting be filed under seal. The cover of this version must identify it as "Public—Redacts material from conditionally sealed record." The requirement to publicly file the redacted version does not apply in juvenile cases; rule 8.401 generally governs access to filings in juvenile cases. In juvenile cases, the cover of the redacted version must identify it as "Redacted version—Redacts material from conditionally sealed record."

- (ii) Lodge an unredacted version of the brief, petition, or other filing that he or she is requesting be filed under seal. The filing must be transmitted in a secure manner that preserves the confidentiality of the filing being lodged. If this version is in paper format, it must be placed in a sealed envelope or other appropriate sealed container. The cover of the unredacted version of the document, and if applicable the envelope or other container, must identify it as “May Not Be Examined Without Court Order—Contains material from conditionally sealed record.”
- (D) If the court denies the motion or application to file the brief, petition, or other filing under seal, the clerk must not place the unredacted brief, petition, or other filing lodged under (C)(ii) in the case file but must return it to the defendant unless the defendant notifies the clerk in writing that it is to be filed. Unless otherwise ordered by the court, the defendant must notify the clerk within 10 days after the order denying the motion or application.

(Subd (b) amended effective January 1, 2016.)

(c) Other confidential records

Except as otherwise provided by law or order of the reviewing court:

- (1) Nothing filed publicly in the reviewing court—including any application, brief, petition, or memorandum—may disclose material contained in a confidential record, including a record that, by law, a party may choose be kept confidential in reviewing court proceedings and that the party has chosen to keep confidential.
- (2) To maintain the confidentiality of material contained in a confidential record, if it is necessary to disclose such material in a filing in the reviewing court, a party may serve and file a motion or application in the reviewing court requesting permission for the filing to be under seal.
 - (A) Except as otherwise provided in this rule, rule 8.46(d) governs a motion or application under this subdivision.
 - (B) The declaration accompanying the motion or application must contain facts sufficient to establish that the record is required by law to be closed to inspection in the reviewing court and to justify sealing of the brief, petition, or other filing.
 - (C) At the time the motion or application is filed, the party must:
 - (i) File a redacted version of the brief, petition, or other filing that he or she is requesting be filed under seal. The cover of this version must identify it as “Public—Redacts material from conditionally sealed record,” In juvenile cases, the cover of this version must identify it as “Redacted version—Redacts material from conditionally sealed record.”

- (ii) Lodge an unredacted version of the brief, petition, or other filing that he or she is requesting be filed under seal. The filing must be transmitted in a secure manner that preserves the confidentiality of the filing being lodged. If this version is in paper format, it must be placed in a sealed envelope or other appropriate sealed container. The cover of the unredacted version of the document, and if applicable the envelope or other container, must identify it as “May Not Be Examined Without Court Order—Contains material from conditionally sealed record.” Material from a confidential record disclosed in this version must be identified and accompanied by a citation to the statute, rule of court, case, or other authority establishing that the record is required by law to be closed to inspection in the reviewing court.
- (D) If the court denies the motion or application to file the brief, petition, or other filing under seal, the clerk must not place the unredacted brief, petition, or other filing lodged under (C)(ii) in the case file but must return it to the lodging party unless the party notifies the clerk in writing that it is to be filed. Unless otherwise ordered by the court, the party must notify the clerk within 10 days after the order denying the motion or application.

(Subd (c) amended effective January 1, 2016.)

Rule 8.47 amended effective January 1, 2016; adopted effective January 1, 2014.

Advisory Committee Comment

Subdivisions (a) and (c). Note that there are many laws that address the confidentiality of various records. These laws differ from each other in a variety of respects, including what information is closed to inspection, from whom it is closed, under what circumstances it is closed, and what procedures apply to closing or opening it to inspection. It is very important to determine if any such law applies with respect to a particular record because this rule applies only to confidential records as defined in rule 8.45, and the procedures in this rule apply only “unless otherwise provided by law.” Thus, where other laws establish specific requirements that differ from the requirements in this rule, those specific requirements supersede the requirements in this rule. For example, although Penal Code section 1203.05 limits who may inspect or copy probation reports, much of the material contained in such reports—such as the factual summary of the offense(s); the evaluations, analyses, calculations, and recommendations of the probation officer; and other nonpersonal information—is not considered confidential under that statute and is routinely discussed in openly filed appellate briefs (see *People v. Connor* (2004) 115 Cal.App.4th 669, 695–696). In addition, this rule does not alter any existing authority for a court to open a confidential record to inspection by the public or another party to a proceeding.

Subdivision (c)(1). The reference in this provision to records that a party may choose be kept confidential in reviewing court proceedings is intended to encompass situations in which a record may be subject to a privilege that a party may choose to maintain or choose to waive.

Subdivision (c)(2). Note that when a record has been sealed by court order, rule 8.46(f)(2) requires a party to file redacted (public) and unredacted (sealed) versions of any filing that discloses material from the sealed record; it does not require the party to make a motion or application for permission to do so. By contrast, this rule requires court permission before redacted (public) and unredacted (sealed) filings may be made to prevent disclosure of material from confidential records.

POSSIBLE APPROACHES TO LIMITING PUBLIC DISCLOSURE OF
ALLEGED MEDIATION COMMUNICATIONS IN
A LEGAL MALPRACTICE CASE BASED ON MEDIATION MISCONDUCT

Approach #1. Seal, redact, present *in camera*, or otherwise insulate from public view all evidence or other material that discloses alleged mediation communications or information from which people could determine the likely content of alleged mediation communications.

Approach #2. Similar to Approach #1, but the restriction on public access would not necessarily apply for the full duration of the case. In other words, the court would restrict public disclosure of alleged mediation communications during the initial stages of a case, but would need to revisit the extent of that restriction, and perhaps disclose more information, upon reaching an adjudicatory stage.

Approach #3. Seal, redact, or otherwise insulate from public view only alleged mediation communications *that are irrelevant* to the legal malpractice case.

Approach #4. Seal, redact, or otherwise insulate from public view only alleged mediation communications *that would be inadmissible at trial*.

Approach #5. Give a court *discretion* to restrict public access to any mediation communication, based on all of the facts and circumstances of a case, as long as that restriction is constitutional.

Approach #6. *Require* a court to restrict public access to mediation communications to the greatest extent constitutionally permissible. This would be similar to Approach #1, but the extent of redaction would be expressly subject to the constitutional limitations.